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# **NAVAL POSTGRADUATE SCHOOL**

## **Monterey, California**



### **THESIS**

**THE LINE ITEM VETO AFTER TWO YEARS:  
A CASE STUDY**

by

J. Christopher Lewis

December 1998

Thesis Advisor:  
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Richard B. Doyle  
Frank J. Barrett

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The primary purpose of this thesis is to determine the political and fiscal impact of the Line Item Veto on the budgeting process. It examines the history of the line item veto prior to the congressional elections of 1994, and then considers the legislative history of the Line Item Veto Act during the 104<sup>th</sup> Congress (1995-96). It explains the various arguments surrounding the requirement for a line item veto, and explores the methods that supporters employed to provide this power to the President. It also considers the various legal challenges to the Line Item Veto Act, culminating with the 1998 Supreme Court ruling that the Act was unconstitutional. The chief finding of the thesis is that, in the Act's only year of employment, it failed to have a significant impact on the budgeting process. President Clinton primarily used the measure to trim items from appropriations bills, most of which came on the Military Construction Appropriations Act. Congress and the federal courts overturned nearly half of his 1997 cancellations prior to the Supreme Court's ruling that the Act was unconstitutional. While it introduced a new dynamic into the budgeting process, it did not represent a significant shift in budgetary powers from Congress to the President, as many critics had feared.

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**THE LINE ITEM VETO AFTER TWO YEARS: A CASE STUDY**

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Captain, United States Marine Corps  
B.A., University of Nebraska-Lincoln, 1991**

**Submitted in partial fulfillment of the  
Requirement for the degree of**

**MASTERS OF SCIENCE IN MANAGEMENT**

**from the**

**NAVAL POSTGRADUATE SCHOOL  
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## **ABSTRACT**

The primary purpose of this thesis is to determine the political and fiscal impact of the Line Item Veto on the budgeting process. It examines the history of the line item veto prior to the congressional elections of 1994, and then considers the legislative history of the Line Item Veto Act during the 104<sup>th</sup> Congress (1995-96). It explains the various arguments surrounding the requirement for a line item veto, and explores the methods that supporters employed to provide this power to the President. It also considers the various legal challenges to the Line Item Veto Act, culminating with the 1998 Supreme Court ruling that the Act was unconstitutional. The chief finding of the thesis is that, in the Act's only year of employment, it failed to have a significant impact on the budgeting process. President Clinton primarily used the measure to trim items from appropriations bills, most of which came on the Military Construction Appropriations Act. Congress and the federal courts overturned nearly half of his 1997 cancellations prior to the Supreme Court's ruling that the Act was unconstitutional. While it introduced a new dynamic into the budgeting process, it did not represent a significant shift in budgetary powers from Congress to the President, as many critics had feared.





## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	A. DISCUSSION.....	1
	B. RESEARCH QUESTIONS.....	5
	C. SCOPE AND ORGANIZATION.....	6
	D. METHODOLOGY.....	7
II.	HISTORY OF THE LINE ITEM VETO.....	9
	A. EARLY YEARS (1861-1974).....	9
	B. MOMENTUM BUILDING AND THE 98 <sup>th</sup> CONGRESS (1974-1984)	13
	C. ITEM VETO ALREADY IN THE CONSTITUTION (1985-1994).....	28
III.	LEGISLATIVE HISTORY OF THE LINE ITEM VETO IN THE 104 <sup>th</sup> CONGRESS.....	37
	A. PASSAGE IN THE HOUSE.....	37
	B. TWO APPROACHES IN THE SENATE.....	45
	C. PASSAGE IN THE SENATE.....	51
	D. LINE ITEM VETO AND THE BUDGET BATTLE.....	56
IV.	USE OF THE LINE ITEM VETO DURING THE 105 <sup>th</sup> CONGRESS.....	63
	A. PREPARING TO USE THE LINE ITEM VETO.....	63
	B. PRESIDENT CLINTON EXERCISES THE LINE ITEM VETO.....	66
	C. CANCELLATIONS MADE BY THE PRESIDENT IN 1997.....	70
	D. TWO METHODS OF DISAPPROVAL.....	80
V.	LEGAL CHALLENGES TO THE LINE ITEM VETO ACT.....	91
	A. EARLY CHALLENGES TO THE ACT.....	91
	B. LINE ITEM VETO ACT RULED UNCONSTITUTIONAL.....	98
	C. CONCLUSION.....	102
VI.	SUMMARY AND CONCLUSIONS.....	105
	A. POLITICAL IMPACT OF THE LINE ITEM VETO ACT.....	106
	B. FISCAL IMPACT OF THE LINE ITEM VETO ACT.....	112
	C. CONCLUSION.....	118
	APPENDIX A. ANALYSIS OF LEGISLATION.....	121

APPENDIX B. HISTORY OF THE LINE ITEM VETO ACT.....	125
LIST OF REFERENCES.....	129
INITIAL DISTRIBUTION LIST.....	137

## **LIST OF TABLES**

Table 1.	Options For Presidential Powers.....	16
Table 2.	Item Veto Measures Introduced In Congress.....	19
Table 3.	Line Item Veto Legislation In The 99 <sup>th</sup> Through 103 <sup>rd</sup> Congresses.....	29
Table 4.	Cancellations Under The Line Item Veto Act.....	72
Table 5.	Cancellations As A Percentage Of Total Discretionary Spending For FY98.....	74
Table 6.	Special Messages In 1997.....	76
Table 7.	Adjustments to Discretionary Spending Caps Due To Line Item Vetoes.....	78
Table 8.	Rescissions During The Clinton Administration.....	114



## **I. INTRODUCTION**

### **A. DISCUSSION**

When the framers of the Constitution established procedures for the passage of laws, they limited the President to three specific actions. First, upon presentment of legislation by Congress, he could sign the legislation into law. Second, he could return it to Congress with his objections. Third, he could allow it to become law without his signature. Supporters of the line item veto have long sought to increase the President's power by allowing him to amend legislation at the time he signed it into law. Realizing that the Constitution did not provide for this, they sought passage of a constitutional amendment. However, support for such an amendment failed to materialize and by the 1980's proponents began introducing measures to provide that power by statutory means.

The history of the line item veto in America can be traced back to the Civil War when the Confederate states adopted the measure in their constitution. Following the war, most new states added it to their state constitutions.

Currently, 43 states provide their governors with some form of line item veto.<sup>1</sup>

Following the Civil War, the nature of legislation changed considerably at the federal level. Congress enacted spending measures with a variety of related and unrelated items contained in legislative riders. By the Constitution, the President was forced to either sign or veto the entire measure. Even though he may have strongly opposed the riders passed by Congress, the President was limited in his ability to stop them. Congress' reliance on legislative riders led President Ulysses S. Grant in 1873, to call for the first line item veto.<sup>2</sup> Since that time several presidents, including Hayes, Arthur, Franklin Roosevelt, Truman, Eisenhower, Reagan, Bush and Clinton have called for such authority.<sup>3</sup>

Short of having the line item veto, presidents have used impoundments to control what they determined to be wasteful spending. Richard Nixon relied heavily on impoundments to implement his spending priorities. In response to his far-reaching use of impoundments, Congress

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<sup>1</sup> U.S. Congress, Joint Committee on Taxation, "Analysis of Provisions Contained in the Line Item Veto Act Relating to Limited Tax Benefits," Jan 3, 1997, p. 7.

<sup>2</sup> Ibid.

<sup>3</sup> Ross, Russell M., and Schwengel, Fred, "An Item Veto for the President?" Presidential Studies Quarterly, vol. 12 (Winter 1982), p. 68.

passed the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344) to limit the ability of future presidents to impound funds. By the 1980's, skyrocketing deficits and the Supreme Court's decision that a portion of the Impoundment Control Act was unconstitutional, led to renewed debate over the necessity of a line item veto.

From 1984 to 1994 conservative Republicans sought passage of a line item veto measure by statutory means. To accomplish this they drafted legislation that increased the President's power to enact rescissions after he had signed a bill into law. There was generally little support for these measures until a Republican majority was elected to Congress in 1994. As one of its major policy objectives, the Republican majority called for passage of the Line Item Veto Act. President Clinton supported the measure as well, and on April 9, 1996, signed the Act into law as P.L. 104-130. The Act was available for use by the President on January 1, 1997.

Though the Line Item Veto was hailed as a deficit control measure, it failed to have much impact in its first and only year of employment. The manner in which the Act was drafted severely limited its ability to control the deficit. The President could only use the Line Item Veto

on discretionary budget authority, new direct spending and targeted tax benefits. He was unable to cancel spending from previously enacted entitlement programs, such as Social Security and Medicare, which comprise the fastest growing portions of the federal budget.

In its first year, the President exercised the Line item Veto 82 times, striking provisions from 11 laws. Of these cancellations, 52 came in defense related bills. Congress subsequently overturned 38 cancellations from the Military Construction Appropriations Act.<sup>4</sup> An additional cancellation from the Treasury Appropriations Act was struck down in Federal District Court. According to the Congressional Budget Office, the cancellations that remained in effect totaled \$569 million over five years.<sup>5</sup> This amount is insignificant when compared to overall discretionary budget authority of \$526 billion for 1997.<sup>6</sup>

After passage of the Line Item Veto Act, opponents challenged its constitutionality in the federal courts. On June 25, 1998, as a result of two lawsuits by plaintiffs who claimed a concrete personal injury because of the Act,

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<sup>4</sup> Congressional Budget Office, 1998, "The Line item Veto Act After One Year," CBO Memorandum, (April) pp. 11-14.

<sup>5</sup> Ibid., p. 13.

<sup>6</sup> Ibid., p. 14.



the Supreme Court struck down the measure, stating that it violated the Presentment Clause of the Constitution.

Though some ardent supporters vow to revive the measure, there appears to be little support for such a move among most members of Congress. Many former supporters, outraged at the President's use of the Line Item Veto, gradually became opponents of the measure. While the long-term future of the Act is uncertain, the Court's ruling closed, for now, another chapter in the history of the line item veto.

#### **B. RESEARCH QUESTIONS**

The primary research question to be addressed in this thesis is: What has been the political and fiscal impact of the Line item Veto Act since its passage in 1996?

Subsidiary questions are:

1. What is the history of the line item veto?
2. What was the nature of the political debate in the 104<sup>th</sup> Congress that shaped passage of the Line Item Veto Act?
3. How has the Line Item Veto been used to control federal spending?
4. What rationale did the President use for employing the Line Item Veto?
5. How did Congress respond to the President's use of the Line item Veto?

6. What have been the results of legal challenges to the Line Item Veto Act?

### C. SCOPE AND ORGANIZATION

This thesis is divided into four parts. First, it provides an historical overview of the line item veto. It will trace the history of the line item veto to provide understanding of its beginnings and original purpose. The historical perspective will present the main arguments for and against the measure. It will also examine the various types of proposed item veto legislation, and the reasons for these different approaches.

The thesis will then examine the legislative history of the Line Item Veto Act in the 104<sup>th</sup> Congress. Passage of the measure in Congress will be thoroughly considered to include the political debates that shaped its passage in each House. The thesis will also demonstrate how final passage of the Line Item Veto Act was affected by a bitterly fought battle over the federal budget. Finally, it will provide a general overview of the measure with emphasis on some parts of the law that will be examined later. This section of the thesis will end with final passage of the measure.

The third part of the thesis will examine the fiscal and political impact of the Line Item Veto Act in the 105<sup>th</sup>

Congress. It will demonstrate how the measure was used and provide insight into its overall effectiveness in controlling federal spending. It will look at two cases where Congress and the federal courts later overturned the President's cancellations. It will also examine the effect of legal challenges on the President's use of the measure. Finally, it will consider the nature of the shift in budgetary powers from Congress to the President.

The fourth part of the thesis will examine legal challenges to the Act's constitutionality. It will discuss the origin and final outcome of four separate cases brought against the Act. It will explain the arguments presented by the plaintiffs as well as the Supreme Court's rulings on legal standing. This portion of the thesis will conclude with the Supreme Court ruling which overturned the Line Item Veto Act.

#### **D. METHODOLOGY**

The data upon which this thesis is based will be derived from a literature search of journals, congressional records, White House releases and periodicals. Information will be obtained from the Office of Management and Budget, the Congressional Budget Office, congressional committees, and rulings in federal court. Some of the information

provided in tables will be derived from computer-aided searches of the Thomas website. The information obtained from this site will deal directly with proposed legislation and congressional reports.

## II. HISTORY OF THE LINE ITEM VETO

When President Reagan asked for the line item veto in his 1984 State of the Union address, he re-focused national debate on a subject which had not been seriously considered since 1957. This was the last time Congress held hearings on the impact of providing such authority to the President. Within three months of Reagan's request, the Subcommittee on the Constitution of the Senate Committee on the Judiciary convened to hear arguments for and against the line item veto. Several senators and experts testified on the efficacy of the line item veto in controlling wasteful spending. However, unlike past debates on the subject, this would be the beginning of a twelve-year controversy, which would result in passage of the Line Item Veto Act in 1996 (PL 104-130).

### A. EARLY YEARS (1861-1974)

The line item veto can be traced back to the Civil War when the Confederate States of America adopted the measure in their Constitution. The author of the measure, Robert H. Smith, stated that it provided the President with the means to "arrest corrupt or illegitimate expenditures."<sup>1</sup>

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<sup>1</sup> Ross, Russell M., and Schwengel, Fred, "An Item Veto for the President?" Presidential Studies Quarterly, vol. 12 (Winter 1982), p. 68.

Article 1, section 7, of the Confederate Constitution stated that "The President may approve any appropriation and disapprove any other appropriation in the same bill." Though he had the power to strike individual items of appropriation, Jefferson Davis, the only Confederate president, never actually exercised the authority.<sup>2</sup> Following the War, item vetoes spread to every new state, except Nevada, as well as many of the older states.<sup>3</sup>

The U.S. Constitution had never provided such authority to the President. The Framers fear of a strong Executive led them only reluctantly to provide the President with any veto power at all. Alexander Hamilton stated in *Federalist no. 73* that:

Without the [absolute or *qualified negative*]\* the [Executive] would be absolutely unable to defend himself against the depredations of the [Legislature]. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote.<sup>4</sup>

In providing this power to the President, the Framers set limits on the extent to which it could be used. First, it

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<sup>2</sup> *Ibid.*, Note 4, p. 78.

<sup>3</sup> U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, Hearings on the Line-Item Veto, "Opening Statement of Hon. Orrin G. Hatch, Chairman" Apr 9, 1984, p 1. (Hereafter, 1984 *Hearings*).

\* The term 'absolute or qualified negative' was used to describe the Executive's ability to disapprove, or veto, legislation, which had been passed by the Congress.

<sup>4</sup> Garry Wills, *The Federalist Papers by Alexander Hamilton, James Madison, and John Jay*, (New York: Bantam Books), p. 372.

was only to be used to veto bills in their entirety.

Article 1, section 7 of the U.S. Constitution states:

Every bill which shall have passed the House of Representatives and the Senate shall, before it become law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that House in which it shall have originated.

George Washington stated the intent of the Framers when he wrote, "From the nature of the Constitution, I must approve all the parts of a Bill or reject it in toto."<sup>5</sup>

Second, Congress could override the President's veto with a two-thirds vote in each house. These two limitations on the President's veto power were part of the "original understanding that the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch."<sup>6</sup>

Though, heretofore, the President had never had such a precise means of reaching into a bill and striking portions to which he objected, by 1873, the nature of legislation had changed considerably. Since the Civil War, the Congress had relied heavily on the practice of attaching legislative riders to appropriations bills to ensure passage of spending measures that would most likely not

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<sup>5</sup> Fitzpatrick, John C., Writings of George Washington, (ed. 1940), vol. 33, p. 96.

<sup>6</sup> Proposals for Line-Item Veto Authority, American Enterprise Institute *Legislative Analysis*, 1984, p. 2.

pass on their own right. These riders had become so prevalent by 1873, that President Grant recommended Congress pass an amendment "to authorize the Executive to approve of so much of any measure passing the two Houses of Congress as his judgement may dictate, without approving the whole."<sup>7</sup>

On January 18, 1876, the first amendment to provide the President with item veto authority was introduced by James C. Faulkner of West Virginia.<sup>8</sup> Since that time, Presidents Hayes, Arthur, Franklin Roosevelt, Truman, Eisenhower, and Reagan have called for similar authority.<sup>9\*\*</sup> At the time of the 1984 hearings on the line item veto, Senator Hatch stated that "over 140 similar proposals have been introduced in Congress."<sup>10</sup> Yet, he continued, "In over 100 years since the first item veto proposal appeared in Congress, only four hearings have been held on the subject."<sup>11</sup> Between his subcommittee's hearings and passage of the Line Item Veto Act in 1996, the number of proposals

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<sup>7</sup> Wilkinson, Vernon L. "Observations on the Item Veto," Aug 13, 1936, p. 4.

<sup>8</sup> Hatch, (1984 *Hearings*) p. 2.

<sup>9</sup> Ross and Schwengel, p. 70.

<sup>\*\*</sup>In their article, Ross and Schwengel list the first six presidents to call for item veto authority. Reagan was added to their original list. Since 1984, Bush and Clinton can be added to the list of presidents to call for this authority.

<sup>10</sup> Hatch, (1984 *Hearings*) p. 2.

<sup>11</sup> Ibid.



would increase by more than one hundred-twenty, and the number of hearings would increase to eleven.

**B. MOMENTUM BUILDING AND THE 98<sup>th</sup> CONGRESS (1974-1984)**

President Reagan's call for the line item veto came at a time when the Federal Government was experiencing huge budget deficits, which were forecast to continue indefinitely. In his first three years as President, the federal debt had grown from \$785 billion to \$1.1 trillion.<sup>12</sup> To contend with ever-growing deficits, Reagan offered the line item veto to reach into appropriations bills and veto specific items as one solution.

I also propose improvements in the budgeting process. Some 43 of our 50 states grant their Governors the right to veto individual items in appropriation bills without having to veto the entire bill. California is one of those 43 states. As Governor, I found this 'line item veto' was a powerful tool against wasteful or extravagant spending.<sup>13</sup>

Though this address brought the line item veto back into the spotlight of public debate, such legislation had been introduced consistently in previous congresses. Representative Charles E. Bennett(D) from Florida had been introducing legislation in each congress for years, even before the 1974 Budget Act. In 1975, as the Congress was

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<sup>12</sup> Budget of the United States Government, 1998, "Analytical Perspectives," Table 12-6.

<sup>13</sup> Reagan, Ronald, "State of the Union Address," Jan 25, 1984.

instituting its new budget procedures, Representative Bennett introduced H.J. Res. 617, calling for an amendment to the Constitution to give the President item veto authority on appropriations bills. Though the Congress had just recently passed legislation to reduce the President's ability to impound budget authority, Representative Bennett essentially sought to do the opposite. The resolution had no cosponsors and was referred to the House Judiciary Committee where it subsequently died. Bennett would continue to introduce such legislation for the next nine congresses, until he retired at the end of the 102<sup>nd</sup> Congress.

Disputes with President Nixon over impoundments had resulted in passage of the Congressional Budget and Impoundment Control Act of 1974 (PL 93-344), which led to a re-definition of the President's role in controlling spending. Under the new Act, Impoundments were divided into two categories, *rescissions* and *deferrals*. Deferrals occur when the President chooses not to spend funds immediately because he believes doing so would not be practical or wise. In such instances, he can propose to defer the spending until a later time. Congress can force him to spend the funds by passing legislation in either the

House or the Senate, which instructs him to do so.<sup>14</sup> Otherwise, the President has up to a year to spend those funds.

Rescissions occur when the President decides not to spend budget authority at all. Congress has 45 days to pass legislation upholding the President's rescissions. If they fail to act at all then the money must be spent after the 45 days.<sup>15</sup>

Most item veto legislation introduced since 1975 has not called for true item veto authority. Instead, supporters of this new power have generally sought enhanced rescission authority. In some respects, the current Act more accurately provides the President with enhanced rescission authority, because of the action required by Congress to overturn his objections. Table (1) outlines the differences between these types of legislation.

An item veto is defined as, "The executive power to block separate parts of a bill."<sup>16</sup> It, therefore, becomes important to define what the parts of the bill are, or what constitutes an item of appropriation. On this subject

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<sup>14</sup> Lowe, Margaret, 1975, "1974 Impoundment Act: Time for Testing," Congressional Quarterly, (Apr 26), p. 860.

<sup>15</sup> Ibid.

<sup>16</sup> Shafritz, Jay M., The HarperCollins Dictionary of American Government and Politics, (New York: HarperCollins, 1992, p. 592.

**Table (1)**  
**Options for Presidential Powers<sup>17\*\*\*</sup>**

	<b>President</b>	<b>Congress</b>	<b>Comment</b>
<b>Enhanced Rescission</b>	Provides authority to propose rescinding all or part of any spending in an appropriations bill after he has signed the bill into law.	Any rescission would go into effect if Congress failed to overturn it. Both Houses would pass a motion of disapproval. The President could veto this measure, which would require a 2/3 vote in both Houses to over-ride.	Like the line item veto, it would ultimately allow the president to force Congress to mount a 2/3 vote in both chambers to override the rescission.
<b>Line Item Veto</b>	Provides authority to veto line items in an appropriations bill after he has signed the bill into law.	The veto would go into effect unless Congress overrode it with a 2/3 vote in both Houses	As with enhanced rescission authority, the line-item veto would give the president substantial authority to control congressional spending as long as he maintained a one-third plus one minority in the House or Senate.
<b>Expedited Rescission</b>	Provides authority to propose rescinding all or part of any spending in an appropriations bill after he has signed the bill into law.	Any rescission would go into effect only if both the House and the Senate approved it by simple majority. Congress would be required to vote on the president's rescission proposal.	This would simply require the House and Senate to vote on the proposed rescissions. The rescissions would go into effect if both Houses approved them by simple majority.
<b>Rescission</b>	Provides authority to propose rescinding all or part of any spending in an appropriations bill after he has signed the bill into law.	The rescission takes effect only if both chambers approve it by a simple majority. Congress is not required to act on the proposed rescissions. If they fail to act, then the money must be spent after 45 days.	This rescission authority was defined in the Impoundment Control Act of 1974. It is still available for use by the president today.

<sup>17</sup> Hager, George, 1993, "GOP, Black Caucus Force Delay in Line-Item Veto Debate," Congressional Quarterly, (Apr 23), p. 1009.

\*\*\* This table has been modified slightly from the original version. Descriptions of some of the measures were changed due to the passage of the Line Item Veto Act in 1996.

there is no clear answer. A Congressional Research Service Memorandum explains:

There is no universally accepted definition of an 'item.' Many appropriations occur as lump-sum amounts in the public law, with the details of itemization contained in report language; an item veto could not delete such items in reports.<sup>18</sup>

Item veto authority would be considerably more precise than what is currently available, but the President would still lack the ability to strike specific provisions to which he objected. More traditionally, presidents have relied on impoundments to control spending in specific areas. Even with item veto authority, such impoundments as defined by the 1974 Budget Act would likely still provide a more precise means for the President to enforce his spending priorities.

Arguments for and against item veto authority have generally focused on whether Congress should be forced to act to overturn the President's objections. Opponents of any such measure argue that this requirement would substantially weaken the power of Congress in relation to the President. Furthermore, they argue that no such power was ever intended by the Framers of the Constitution. Any legislation that required Congress to act to overturn the

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<sup>18</sup> McMurtry Virginia A., 1994, "The President and the Budget: Expanded Impoundment and Item Veto Proposals," Congressional Research Service (Oct. 6) p. CRS-10.

President's objections to parts of a bill would violate Article 1, section 7 of the Constitution.

Due to the historic view that this power is not granted in the Constitution, most legislation introduced in the 1970's and early 1980's called for a constitutional amendment. The first statutory measure that sought to provide this power to the President was H.R. 6686, sponsored by Representative Bill Archer(R) of Texas during the 97<sup>th</sup> Congress. Once again this legislation was referred to the House Judiciary Committee and no further action was taken on it.

Through the 1980's and early 1990's, the number of resolutions calling for enhanced rescission or item veto power for the President continued to increase. Table (2) shows the number of statutory measures and resolutions that called for a constitutional amendment introduced in the 97<sup>th</sup> through the 103<sup>rd</sup> Congress.

As can be seen from the table, congressional support for some type of item veto measure continued to increase. These bills can be broken down into four broad types. First, a significant number of them simply called for the President to have the authority to veto line items in appropriations bills. Another type would allow the

President to either rescind or reduce budget authority on appropriations items. A third type would enroll each item of appropriation into a separate bill for presentment to the President. This was ostensibly to avoid a question over the constitutionality of the measure.

**Table (2)**  
**Item Veto Measures**  
**Introduced in Congress\*\*\*\***

<b>Congress</b>	<b>Bills</b>	<b>Amendments</b>
94 <sup>th</sup>	0	1
95 <sup>th</sup>	0	5
96 <sup>th</sup>	0	3
97 <sup>th</sup>	1	3
98 <sup>th</sup>	4	13
99 <sup>th</sup>	7	10
100 <sup>th</sup>	8	9
101 <sup>st</sup>	14	13
102 <sup>nd</sup>	9	20
103 <sup>rd</sup>	17	18

A fourth type of measure can be characterized as a legislative and line item veto. Congress had long used the so-called legislative veto, to control policy decisions in executive branch agencies. Legislative vetoes were written

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\*\*\*\* Information provided in this chart was compiled through a computer-aided search in the "Thomas" Website at <http://thomas.loc.gov/>. The search query was "item veto" through the *Bill Summary & Search* page. The search was conducted in each of the previous Congresses and a summary for each bill was

into a variety of laws which authorized the establishment of these agencies. According to Diane Granat of Congressional Quarterly, "a legislative veto is a tool by which a single congressional committee, one house of Congress or both the House and Senate may overturn an executive branch regulation or order."<sup>19</sup> Congressional committees could use this veto power to influence decision making on policies of executive branch agencies.

One of the most important Supreme Court cases involving legislative vetoes was the *Immigration and Naturalization Service v. Chadha*. In this case, Congress used a provision of the Immigration and Nationality Act of 1952, which gave either chamber the authority to veto a decision by the INS. Under this provision the Congress vetoed a 1974 decision by the INS not to deport Jagdish Chadha, a student from Kenya who had overstayed his visa.<sup>20</sup> Chadha brought suit challenging the legislative veto and in 1983, the Supreme Court ruled 7-2 in his favor. Stanley Brand, legal counsel for the House of Representatives

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obtained. The search also returned several bills, which called for enhanced rescission authority, but only those bills which were similarly listed as item veto measures were retained.

<sup>19</sup> Granat, Diane, 1983, "Legislative Vetoes Are Passed Despite High Court Decision," Congressional Quarterly, (Oct 29) p. 2235.

<sup>20</sup> Weiss, Laura and Witt, Elder, 1982, "Battle over Legislative Veto Coming to a Head Feb. 22 Before the Supreme Court," Congressional Quarterly, (Feb 6) p. 202.



quipped, "It took the Court 18 months to screw up what it took Congress fifty years to set up."<sup>21</sup>

Implications for the ruling were wide spread. Several hundred laws had been passed with legislative veto provisions, including the Congressional Budget and Impoundment Control Act of 1974. The Supreme Court's ruling effectively nullified the provisions in the law, which dealt with how Congress overrides presidential deferrals. Dale Tate of Congressional Quarterly wrote, "since deferral resolutions do not have to be signed by the President, most authorities agree they fall within the legislative veto category struck down by the Supreme Court."<sup>22</sup>

Within the four general types of line item veto proposals there are several distinguishing characteristics. According to the American Enterprise Institute, by March of 1984, 14 such proposals had been introduced in the 98<sup>th</sup> Congress.<sup>23</sup> Of these, nine would allow line item veto of appropriations only, and three would allow the President to reduce appropriations. Five would authorize the President

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<sup>21</sup> Pressman, Steven, 1983, "Congress Considers Choices in Legislative Veto Aftermath," Congressional Quarterly, (July 2) p 1327.

<sup>22</sup> Tate, Dale, 1982, "High Court Decision Reopens Dispute Over Impoundments; Congress Loses Spending Tool," Congressional Quarterly, (July 2) p 1331.

<sup>23</sup> Proposals for Line-Item Veto Authority, p.8.

to veto items of appropriations on legislative riders. Eight would authorize the President to only veto appropriations for executive branch agencies, exempting both the legislative and judicial branches from this authority. Yet another proposal would allow the President to veto items of appropriation from any branch of government, but would exempt national defense bills from that authority.<sup>24</sup>

Furthermore, two proposals would provide for congressional override of the presidential line item veto by a simple majority rather than a two-thirds majority. One proposal would authorize the legislative veto. Only three of the fourteen proposals would authorize the line item veto by statutory means, rather than amendment to the Constitution.<sup>25</sup>

The proposals introduced in the 98<sup>th</sup> Congress provide an excellent view of the manner by which legislators have sought to enhance the President's power. The most significant difference between past proposals and what occurred in the 1980's and 1990's, was the rapid increase in the number of statutory measures which sought to provide this power. Throughout the long history of line item veto

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<sup>24</sup> Ibid., pp.8-10.

<sup>25</sup> Ibid.

proposals, the majority had focused on the need to amend the Constitution. The most likely way to accomplish this would be to get two-thirds of both the Senate and the House of Representatives to pass a resolution and then get three-fourths of the states to ratify it. However, even with the increased interest in the subject and Republican control of the Senate, this was unlikely.

Though the line item veto was a tool generally championed by fiscal conservatives, there were several such conservatives that refused to support it. One of these was Senator Mark Hatfield(R) from Oregon, Chairman of the Senate Appropriations Committee. During hearings on the line item veto in 1984, Senator Hatfield expressed his reservation to such a measure, stating that "As a means to balance the budget, the line-item veto is all but meaningless."<sup>26</sup> This was because proposals left out the fastest growing portions of the budget, namely entitlements. Of the areas that the line item veto could affect, he continued, non-defense discretionary spending would bare "the brunt of spending reductions."<sup>27</sup>

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<sup>26</sup> Hatfield, Mark O., (1984 *Hearings*) p. 19.

<sup>27</sup> Ibid.

Senator Hatfield was also concerned that the line item veto would cause a significant shift in the balance of power between the legislative and executive branch.

The line-item veto will empower the President to go beyond the simple control on overall spending, and allow him to virtually dictate spending priorities over individual programs and activities. With this power the President can frustrate a decision of the Congress on any individual program, be it for political or ideological reasons, or simply because of personal bias.<sup>28</sup>

Representative Mickey Edwards(R) from Oklahoma, in a prepared statement, used a specific example to explain his opposition to the item veto. One of the failures of such a measure would involve the President's role in agreeing to foreign aid. He wrote,

As with any other piece of legislation, the process involves compromise and balance. The fact that one country may receive only humanitarian aid, another receives only military and security aid and a third receives both kinds of aid is a matter of policy- Not just numbers. For a president to remove any portion of that bill, shifts the policy of the United States because the remainder becomes law.<sup>29</sup>

Representative Edwards went on to ask, what will happen to the minority's ability to pass legislation if both the Presidency and the Congress are controlled by the same party and the President has line item veto authority? "The

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<sup>28</sup> Ibid.

<sup>29</sup> Edwards, Mickey (1984 *Hearings*) p. 27.

issue is much larger than discussions over pork-barrel spending," he concluded.<sup>30</sup>

One of the leading Republican senators who favored the line item veto was Senator Mack Mattingly from Georgia. Senator Mattingly was the author of two resolutions S.J. Res. 178 and S. 1921, which called for the line item veto. Of these, S.J. Res. 178 called for a constitutional amendment and S. 1921 sought to provide statutory power to the President. In testimony before the Subcommittee on the Constitution, he pointed out that due to changes which the Framers could not have envisioned, the budget process requires passage of a line item veto.

I think when our Founding Fathers set up our system of Government, they could not see 200 years down the road of history. Congress was in session just a few weeks of the year, and those appropriation bills were very small and manageable. . . But times have changed. The entire Federal budget for 1790 would not even pay for the paper clips that the bureaucracy now wastes each year. There are just 13 appropriation bills. Often the country is operated by continuing resolutions passed at night, or the last day.<sup>31</sup>

Senator Mattingly went on to say that if the President vetoes these large bills because of some smaller portions

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<sup>30</sup> *Ibid.*, p. 28.

<sup>31</sup> Mattingly, Mack (1984 *Hearings*) p. 42.

to which he objects, then he risks shutting down vital functions of the government that he wishes to preserve.

A written statement by the Secretary of the Treasury, Donald T. Regan, echoed Mattingly's point.

The absence of line-item veto authority from the Constitution does not reflect a decision by the Framers to deny that power to the President; the Framers simply never considered the issue. Undoubtedly, they anticipated that Congress would provide funds by passing separate appropriations bills for discrete programs or activities, rather than omnibus bills encompassing a variety of related and unrelated matters.<sup>32</sup>

Under the current system, supporters argued the President was forced to accept an entire bill with all of its extraneous provisions or veto the entire bill and risk shutting down the government. Though supporters may reluctantly agree that the line item veto could not have a significant impact on the deficit since it focused only on appropriations bills, they viewed it as an important means for limiting *logrolling*, which was considered a major cause of pork-barrel spending. In general terms though, it was being touted as one of the two important instruments (the other being a balanced budget amendment) to bring runaway deficits under control. For all the debate in the 98<sup>th</sup> Congress over item veto authority, the only vote came as a

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<sup>32</sup> Regan, Donald T. (1984 *Hearings*) p. 173.

result of an amendment proposed by Senator Mattingly to H.R. 2163, the Sport Fish Restoration Revenue Act. This bill, which authorized funds for the National Recreational Boating Safety Fund for state recreational boating safety programs, became the recipient for everyone who had a rider. Well over 50 amendments were proposed to this bill, some dealing with deficit reduction legislation.

Among these amendments was S. AMDT. 3045, to authorize the President to use the item veto for fiscal years 1985 and 1986. The amendment had four cosponsors-- Senators Dixon, Evans, Exon and D'Amato. On May 3, Senator Mattingly proposed the amendment. Senator Chiles(D) from Florida then raised a point of order, challenging the amendment on the grounds that it was unconstitutional. Mattingly moved to table (or kill) the point of order, but his motion was rejected 45-46. Then the point of order was upheld by a vote of 56-34.<sup>33</sup> In the vote to uphold Senator Chiles' point of order, Republicans voted 21-30 against, while Democrats voted 35-4 in favor.<sup>34</sup>

This vote had provided the sense of the Senate for the 98<sup>th</sup> Congress. Senators overwhelmingly believed that item veto authority could not be provided to the President

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<sup>33</sup> *Congressional Record*, (May 3, 1984), p. S5355.

<sup>34</sup> *Senate Recorded Votes 86 and 87, Congressional Quarterly*, May 5, 1984, p. 1064.

through statutory means, and were furthermore, not ready to provide him with that authority. Though the issue would continue to garner support, it had run its course in the 98<sup>th</sup> Congress.

**C. ITEM VETO ALREADY IN THE CONSTITUTION (1985-1994)**

Debate on the line item veto continued over the next several congresses. Fiscal conservatives championed the measure for its deficit-cutting ability, and pushed for amendments to legislation on numerous occasions. Though the votes were generally rejected, it was clear that the issue was not going away. Table (3) is a list of votes on item veto legislation in the 99<sup>th</sup> through 103<sup>rd</sup> Congresses.

As can be seen from the table, supporters had little success in passing their amendments. The notable exception was S. ADMT. 264 in the 103<sup>rd</sup> Congress. This amendment stated simply that it was the "Sense of the Senate that the President should be granted line-item veto authority over items of appropriation and tax expenditures." It further provided that "each item of appropriation or each tax expenditure should be separately enrolled for presentment to the President; and the new authority [should] expire at the conclusion of the 103<sup>rd</sup> Congress."<sup>35</sup>

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<sup>35</sup> *Congressional Record*, (March 24, 1993), p. S3679.



**Table (3)**  
**Line Item Veto Legislation**  
**in the 99<sup>th</sup> Through 103<sup>rd</sup> Congresses**

<b>Congress</b>	<b>Legislation(Sponsor)</b>	<b>R C #</b>	<b>Vote</b>	<b>Comment</b>
99 <sup>th</sup>	S. 43(Mattingly)	156 157 158	57-42, 57-41, 58-40	Measure withdrawn after motion to invoke cloture failed 3 times.
101 <sup>st</sup>	S. AMDT. 1995 to S.341(McCain)	111	43-50	Motion to waive Budget Act rejected.
102 <sup>nd</sup>	H. AMDT. 602 to H.J. Res 290(Kyl)	183	170-258	On agreeing to the amendment.
	S. AMDT. 1698 to S. 479 (McCain)	33	44-54	Motion to waive Budget Act rejected.
	S. AMDT. 1092 to H.R. 3015(Coats)	294	40-51	House and Senate Conference Report on Transportation. Motion to waive Budget Act rejected.
103 <sup>rd</sup>	H. AMDT. 468 to H.J. Res. 103(Kyl)	60	179-242	
	S. AMDT. 264 to S. Con Res. 18 (Bradley)	75	<b>73-24</b>	On agreeing to the amendment
	S. AMDT. 73 to S. 460 (McCain)	27	45-52	Sense of the Senate that the president should be granted line item veto authority.
	H. AMDT. 758 to H.R. 4600(Solomon)	327	205-218	
	S. AMDT. 542 to S. 1134 (Bradley)	176	53-45	Motion to waive Budget Act rejected.
				On agreeing to the amendment.
				Motion to waive Budget Act rejected.

The Sense of the Senate amendment, however, was essentially a powerless vote for moving forward item veto legislation. Because of this, the vote did not accurately convey the feelings of Senators, who may have voted in favor of the amendment for other reasons. Such was the case of Senator Robert C. Byrd(D) from West Virginia. Byrd who served as the Senate Appropriations Committee Chairman at the time of the vote, is one of the Senate's most ardent opponents of the line item veto. Angry over accusations that the deficit was the result of Appropriations Committee spending, Byrd stated that he used this vote to send "a shot across the bow to other committees, some of whose members [had] been joining in an assault on appropriations."<sup>36</sup>

Still, the large number of bills and related hearings demonstrated the continued momentum of the measure. On April 11, 1989, hearings were held by the Senate Subcommittee on the Constitution to consider three item-veto proposals (S.J. Res. 14, S.J. Res. 23, S.J. Res. 31). In 1994, the Senate's Constitution Subcommittee and Budget Committee held hearings on the subject. Within ten years

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<sup>36</sup> Hager, George, 1993, "Byrd's Warning Shot," Congressional Quarterly, (Mar 27), p. 733.

of Reagan's request, the number of hearings on the line item veto had matched that of the 100 years prior.

Additionally, legislation signaling a shift in fiscal responsibility between the Congress and the President was having success in the House of Representatives. In 1992, a bill calling for expedited rescission authority for the President (H.R. 2164) passed overwhelmingly in the House. Then, over the next two years, two similar measures (H.R. 1578 and H.R. 4600) passed the House. These measures would make it mandatory for Congress to vote on recommended rescissions by the President. Though the measures were substantially weaker than true item veto authority, they represented a major shift in opinion on the President's role in controlling spending.

One of the most significant events that occurred during this period began with a column by Steven Glazier in the Wall Street Journal on December 4, 1987. In his article, Glazier contended that the Constitution already provided the President with item veto authority. To support his argument, he relied on Article 1, section 7, clause 3, which states in part,

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a

question of adjournment) shall be presented to the President of the United States...

Glazier argued that the only reason this clause was inserted into the Constitution was because the Framers, especially James Madison, wanted to keep future congresses from being able to "subvert the presidential veto by merely labeling its actions "'resolutions, votes, etc.'" instead of 'bills.'" <sup>37</sup> Congressional practices of attaching legislative riders to bills, as well as passing large bills, which include a variety of programs, are a means of subverting the presidential veto, he said. "This is the very game of form and name that inspired clause 3." <sup>38</sup>

This argument immediately began to draw supporters. Academics such as Forrest McDonald agreed that the clause was "designed to prevent the Congress from running amok, [and] to make responsibility lie in the presidency." <sup>39</sup> McDonald went on to say that one of the objections to the Constitution carried in Anti-Federalist tracts at the time, was that clause 3 "made too strong a line-item veto in the hands of the President." <sup>40</sup>

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<sup>37</sup> Glazier, Stephen, 1987, "Reagan Already Has Line-Item Veto," *Wall Street Journal*, (Dec 4) p. 12.

<sup>38</sup> *Ibid.*

<sup>39</sup> McDonald, Forrest, "The Framers' Conception of the Veto Power," (1994 Constitution Subcommittee Hearings), p. 9.

<sup>40</sup> *Ibid.*

In 1988, administration officials reviewed the argument that President Reagan may already possess the line item veto. However, a *Memorandum for the Attorney General*, released in July of 1988 refuted the idea that the Constitution provided such power to the President. The lengthy Memorandum focused on whether a 'Bill' must be limited in scope.

If this term was intended to mean a legislative measure limited to one item of appropriation or to one subject, then it may be argued that the President properly may consider measures containing more than one such item or subject as more than one 'Bill' and, therefore, may approve or disapprove of each separately. . . Our review, however, of the relevant constitutional materials persuades us that there is no constitutional requirement that a 'Bill' must be limited to one subject.<sup>41</sup>

The Memorandum went on to refute both Glazier's and McDonald's arguments as well as others who supported their view.

Supporters generally focused on Massachusetts and its State Constitution prior to the adoption of the U.S. Constitution, which served as the model for clause 3. The Massachusetts State Constitution used the term "revisal" to explain the Governor's actions upon receiving a bill from

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<sup>41</sup> Cooper, Charles J., "Memorandum for the Attorney General," (1994 Constitutional Subcommittee Hearings), p. 123.

the Legislature. McDonald argued that this meant he could make changes as he thought necessary.<sup>42</sup>

The Administration disputed the view, however. Citing that the term had two possible meanings at the time, it argued that the only one that made sense was to "simply review something." The Memorandum continued, saying that even accepting McDonald's contention, it still didn't provide the President with such power because the term was ultimately left out of the U.S. Constitution.<sup>43</sup>

Still, support for the idea grew in Congress and resulted in the introduction of legislation encouraging the President to exercise such a constitutional authority. Resolutions were introduced in the 101<sup>st</sup>, 102<sup>nd</sup>, and 103<sup>rd</sup> Congresses. One such resolution was S. Res. 245, introduced by Senator Specter in the 103<sup>rd</sup> Congress, which encouraged the President to exercise the authority to determine its constitutionality.

President Bush considered using the power, but only if he could identify a suitable case. While in a major battle with Congress over the budget, he gave the impression that he was considering whether to try it out on one of the fiscal year 1990 appropriations bills. In an interview in

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<sup>42</sup> Ibid., p 158.

<sup>43</sup> Ibid., p 159.

1989, he stated, "I'd like to test it the way it is. If I found the proper narrowly defined case, I'd like to try that and let the courts decide."<sup>44</sup> This led to increased concern among those in Congress who opposed the position. In the end though, President Bush never actually tested the issue.

When the 103<sup>rd</sup> Congress convened with a newly elected Democrat as President, passage of item veto legislation was still considered unlikely. Like Presidents Reagan and Bush, Clinton supported the item veto, having used it during his tenure as Governor of Arkansas. Some pundits had long argued that the typically Republican-backed legislation would not be desired if a Democrat was serving as President. This proved not to be the case however, as the number of proposals continued to increase, as did calls for the President to exercise the authority anyway, to test whether it was constitutional.

Coincidentally, one notable and long-time opponent of the line item veto, Senator Bill Bradley(D) from New Jersey did switch his stance to support the issue in January of 1993. Stating that he did so out of exasperation with the

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<sup>44</sup> Calmes, Jackie, 1989, "A Bush Line-Item Veto?", Congressional Quarterly, (Oct 28) p. 2848.

budget deficit, the action moved him into the small minority of his party that supported the measure.<sup>45</sup>

By the second session of the 103<sup>rd</sup> Congress, support for item veto legislation resulted in two separate hearings by the Senate. The Subcommittee on the Constitution and the Committee on the Budget heard testimony from a variety of witnesses. Arguments from all sides of the issue were presented, including consideration of whether the Constitution already provided the power to the President.

The last of these two hearings was held in October of 1994, just one month before a Republican majority would be elected in both Houses. With the election of the Republican majority, the item veto became increasingly likely. President Clinton would support legislation calling for the measure, and the Republican majority saw it as an important measure to control federal spending. In the House of Representatives Republicans gave the line item veto top priority, placing it on a list of objectives they had entitled the "Contract with America." Within a year, the line item veto would pass the House. Within two years it would be signed into law by President Clinton, closing the chapter on an issue that had begun 120 years before.

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<sup>45</sup> Hager, George, 1993, "Bradley Bill Backs Line-Item Veto," Congressional Quarterly (Jan 16) p. 123.



### **III. LEGISLATIVE HISTORY OF THE LINE ITEM VETO IN THE 104<sup>th</sup> CONGRESS**

When the 104<sup>th</sup> Congress convened on January 4, 1995, with a Republican majority in both houses, passage of the line item veto became a top priority. The House had placed the measure atop its list of legislative goals entitled the "Contract with America," giving it equal priority with the balanced budget amendment.<sup>1</sup> The Senate was similarly committed to increasing the President's power to cut wasteful spending. As part of its "Seven More in '94" platform, the line item veto was considered essential in concert with the balanced budget amendment. In the Senate, however, there were differing views over just how much power to give the President. This dispute, along with the failure of Congress and the President to agree on the fiscal year 1996 budget, ultimately put the line item veto's final passage in doubt.

#### **A. PASSAGE IN THE HOUSE**

One of the few issues the newly elected House Republicans and President Clinton could agree on was the need for a strong line item veto measure. House Republicans had settled for three weaker expedited

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<sup>1</sup> Hook, Janet, 1995, "Work Begins on GOP Agenda," Congressional Quarterly, (Jan 7), p. 9.

rescission proposals in years past, but now that the pendulum had swung fully in their favor they sought a true shift of budgetary powers. The vehicle they would use to provide this new power to the President was H.R. 2, the "Line Item Veto Act." On January 4<sup>th</sup>, H.R. 2 was introduced by Representatives Clinger(R), Blute(R), Neuman(R) and Parker(D) and was referred to both the Committee on Government Reform and Oversight and the Committee on Rules. The new measure was very similar to the Solomon substitute to H.R. 4600, which had lost on a very close vote of 205-218 in July of 1994.<sup>2</sup>

H.R. 2 was actually much stronger than a traditional line item veto. As reported in the House, the measure provided the President with the power to "rescind all or part of any discretionary budget authority." The President would not be limited to line items listed in an appropriations bill. Instead, he would be able to rescind specific programs which are normally only specified in report language that accompanies the bill. If the President was limited to striking items from an appropriations bill only, then Congress would still be able to shield questionable programs within the lump-sum

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<sup>2</sup> U.S. Congress, House of Representatives, Committee on Rules, Rept 104-11, Part 1, Jan 27, 1995, pp. 4-5.

spending items of the bill. The President would be forced to veto the entire item just to get at the program to which he objected.

Though titled a "Line Item Veto," H.R. 2 was actually an enhanced rescission measure. Long considered the strongest type of expanded rescission measure, it was also designed to avoid the need for a constitutional amendment. Under a traditional line item veto, the President would be able to veto specific items within an appropriations bill when it was presented to him. The Congress could then overturn the President's vetoes with a two-thirds vote in each House. Such a measure would require a constitutional amendment, yet it would provide less flexibility to the President in vetoing those specific provisions to which he objected. Robert Reischauer described the limitations a line item veto would place on the President when he testified before a joint committee hearing on January 12, 1995.

For example, if a bill making appropriations to the State Department included (among others) a lump-sum appropriation of \$20 billion for foreign aid, the item veto would give the President only two options: he could approve the whole \$20 billion or veto the item in its entirety. He could not reduce the amount to \$15 billion, or

cut out only aid to a particular country, since the appropriation was not itemized that way.<sup>3</sup>

The sponsors of H.R. 2 sought to provide considerable flexibility to the President while avoiding the difficult process of amending the Constitution. To accomplish this the bill would simply amend the Congressional Budget and Impoundment Control Act of 1974, by strengthening the President's already existing rescission powers. After signing the bill into law, the President would have ten calendar days (not including Sundays) to send a special message to Congress *canceling* the specific items to which he objected. If Congress failed to pass a "rescissions/receipt disapproval bill" in twenty days to overturn the President's cancellations then the President's rescissions would remain in effect. The burden would now be on the Congress to act, which by itself represented a significant shift in power over the 1974 law.

H.R. 2 also sought to provide the President with the power to cancel special interest tax benefits. These "targeted tax benefits" were originally limited to legislation aimed at reducing the tax burden for five or fewer beneficiaries. Following a mark-up in the Committee

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<sup>3</sup> U.S. Congress, Joint Hearing before the Committee on Government Reform and Oversight, House of Representatives, and the Committee on Governmental Affairs, Senate, "Prepared Statement of Robert D.

on Government Reform and Oversight, that definition was expanded to include:

Any provision of a revenue or reconciliation Act which the President determines would provide a Federal tax benefit to one hundred or fewer taxpayers. As defined by the bill, any partnership, limited tax benefit, trust or 'S' corporation and any subsidiary or affiliate of the same parent corporation would be counted as a single beneficiary.<sup>4</sup>

Prior to expanding the definition, Mr. Reischauer testified that the narrow provision could be easily avoided in a variety of "ingenious" ways to keep a provision from being subject to the President's rescission.<sup>5</sup> The Committee on Government Reform and Oversight's broader definition was meant to reduce the chance that special interest tax breaks could avoid the new measure.

In making a cancellation, the President was to determine that it would reduce the Federal budget deficit; did not impair any essential Government functions; and, would not harm the national interest. Ensuring these requirements were met, the President would transmit a special message to Congress within five days of the enactment of the pertinent bill into law. Transmission of

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Reischauer, Director, Congressional Budget Office," January 12, 1995, p. 64. (Hereafter, 1995 *Joint Hearings*).

<sup>4</sup> U.S. Congress, House of Representatives, Committee on Government Reform and Oversight, Rept 104-11, Part 2, Jan 30, 1995, p. 15.

<sup>5</sup> Reischauer, Robert D., 1995 *Joint Hearings*, p. 67.

the special message would include such items as the amount of budget authority rescinded; any account, department or establishment of the Government to which such budget authority was to be available for obligation, and the specific project involved; the reasons and justifications for rescinding the funds; and the estimated fiscal, economic, and budgetary effect of the rescission.

The bill, as amended, was reported favorably out of the Committee on Rules on January 26, with a vote of 9-4.<sup>6</sup> The amendments dealt mainly with the nature of information required for submission in a rescissions/ receipt disapproval bill, and the manner by which disapproval legislation would be considered in the House of Representatives.

A dissenting view was filed by Representatives Moakley(D), Beilenson(D), Frost(D), and Hall(D) which focused on the need to maintain a balance between "legislative proposals and their execution and implementation by the President."<sup>7</sup> It was this conflict, they contended, that gave rise to the 1974 law, which was necessary to re-establish the balance which the Framers of the Constitution had intended. The Representatives

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<sup>6</sup> U.S. Congress, House of Representatives, Committee on Rules, Rept 104-11, Part 1, Jan 27, 1995, p. 11.

<sup>7</sup> Ibid., p. 17.

believed H.R. 2 upset that balance and that a more responsible approach to increasing the President's power would be through an expedited rescissions measure. They had introduced such a substitute in the Committee on Rules, which failed by a vote of 4-9.<sup>8</sup>

In the Committee on Government Reform and Oversight, H.R. 2 was amended to re-define targeted tax benefits and to ensure that rescissions enacted by the President would reduce the spending caps established under the Budget Enforcement Act of 1990. The Committee also included a requirement for the General Accounting Office to report on all rescissions and targeted tax benefits "submitted through special messages" for each fiscal year.<sup>9</sup>

The Committee passed H.R. 2 by a vote of 30-11, with all Republicans and six Democrats voting in favor of the bill. It was reported to the Committee on the Whole House on January 30<sup>th</sup>, and called up under an open rule, which passed by a voice vote on February 2<sup>nd</sup>.<sup>10</sup> The measure was debated on the floor of the House of Representatives on the 3<sup>rd</sup> and 6<sup>th</sup>, during which only one amendment was agreed to.

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<sup>8</sup> *Ibid.*

<sup>9</sup> U.S. Congress, House of Representatives, Committee on Government Reform and Oversight, Rept 104-11, Part 2, Jan 30, 1995, p. 2.

<sup>10</sup> *Congressional Record*, (Feb 2, 1995), p. H1086.

The amendment, offered by Representative Obey(D), sought to provide the President with the power to rescind items from the already passed fiscal year 1995 appropriations bills. Upon introducing the amendment, Representative Obey explained his position regarding H.R. 2.

What I am doing is trying to ensure that, if we are going to pass this misguided proposal, that at least we will be able to give the President the ability to reach any and all projects in the 13 appropriation bills which passed last year.<sup>11</sup>

Though he ultimately voted against the legislation, Representative Obey wanted to ensure the President had the power to cancel unobligated budget authority listed in a packet called "Questionable Fiscal '95 Projects by Subcommittee." His amendment passed the House by a voice vote on February 3<sup>rd</sup>.<sup>12</sup>

As a birthday gift to Ronald Reagan, H.R. 2 passed in the House of Representatives on February 6<sup>th</sup>, by a vote of 294 to 134.<sup>13</sup> It provided the President with broad flexibility to reach into appropriations bills and cancel specific provisions. This legislation would serve as the model for the final bill presented to the President in April of 1996. It would take the place of three different

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<sup>11</sup> Ibid., (Feb 3, 1995), p. H1190.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., (Feb 3, 1995), p. H1264.



and controversial proposals in the Senate, passing as S. 4, after a long and difficult conference. Then it would serve as a sweetener to get conservatives in the House to agree to a debt limit increase, following one of the most disruptive battles over spending in the Nation's history.

#### **B. TWO APPROACHES IN THE SENATE**

Unlike Republicans in the House, Senate Republicans were divided over how much authority to provide the President. Similar to their experience in 1985, opposing groups within the party threatened to keep the line item veto from ever passing. In that year, Senator Hatfield(R) had opposed the measure and successfully filibustered three cloture attempts by Senator Dole(R). In 1995, the two Senators that took center stage on the issue were Senator John McCain(R) from Arizona and Senator Pete Domenici(R) from New Mexico.

Senator McCain introduced S. 4, the "Legislative Line Item Veto Act," on January 4<sup>th</sup>, a bill that was very similar to H.R. 2 in the House. He explained that this was the same bill he had sponsored for the past eight years, and that it was needed because "Congress' addiction to pork had grown to obscene proportions."<sup>14</sup> The need for such a strong

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<sup>14</sup> Ibid., (Jan 4, 1995), p. S98.

item veto measure was rooted in his belief that Congress could not control its desire to spend money. Strong action by the President would be necessary to keep the Congress from spending beyond its limits. He continued:

The disease that plagues us is our budget and spending habits. If we continue funding carelessly and recklessly; ignore budgetary constraints and economic realities-- if we continue to ignore this problem-- we risk our Nation's future. . . Mr. President, we must act to restore budgetary restraint in the Congress.<sup>15</sup>

Senator Domenici's bill, S. 14, would provide the President with far less power to cancel budget authority. His measure would simply strengthen the President's role by giving him expedited rescission authority over discretionary spending and tax benefits. Under the proposal, Congress would be forced to vote to overturn the President's rescissions, but would need only a simple majority to do so. Both bills were referred jointly to the Committee on the Budget and the Committee on Governmental Affairs with instructions that if one of the committees reported the bill favorably then the other would have 30 days to report the bill. Senator Domenici was Chairman of the Budget Committee, and as such had a great deal of influence over how each measure would be reported. Though he vehemently disagreed with Senator McCain's bill on the

grounds that it would give too much power to the President, he gave it equal consideration in the Budget Committee.

On February 14, the Budget Committee held a markup session on S. 4. During the session, the measure was amended to include a "lock-box" mechanism requiring any savings derived from the President's rescissions to be used for deficit reduction. The amendment was agreed to by a voice vote. The committee then approved the bill along party lines on a vote of 12-10, with Senator Domenici voting in favor of the legislation.<sup>16</sup>

In additional remarks on the report, Domenici expressed his reservations to the bill, and stated that, ultimately, he would not support it without major changes. Quoting James Madison, he explained that the Congress must guard its constitutionally prescribed "power of the purse." Once the Congress delegated away its responsibility to the President, it would never get it back, he said. He concluded his remarks stating:

This is much more than an issue about wasteful spending, it is an issue of the appropriate balance of powers between the Congress and the President. I hope we can agree on an approach that gets a bill on the President's desk and signed into law without unduly disrupting this delicate balance of power.<sup>17</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> U.S. Congress, Senate, Committee on the Budget, Rept 104-9, Feb. 27, 1995, pp. 4-13.

<sup>17</sup> Ibid., pp. 14-16.

Like Senator Domenici, Senator Exon(D) from Nebraska was concerned about the tremendous shift in power S. 4 represented. Exon served as Ranking Member on the Budget Committee, and had originally been a co-sponsor of S. 14, which represented the limits to which most Democrats were willing to go to provide additional budgetary powers to the President. Writing the *Minority Views* on S. 4, Senator Exon stated that it "falls short of comprehensive and pragmatic line item veto legislation."<sup>18</sup>

Exon was deeply concerned with the requirement of a two-thirds majority to override the President's rescissions. In a passionate defense to keep the Senate from inflicting such "ideological purity" on itself and the American people, he argued many of his colleagues were:

Concerned that the super-majority rule is a boomerang that could come back and hit us when we least expect it. Under S. 4, the President needs a mere thirty-four percent of one House of Congress to rescind an appropriation that the Majority of Congress voted to approve. Therefore, S. 4 could unwittingly create a tyranny by the *Minority*. The Senate certainly does not need any further cause for gridlock.<sup>19</sup>

Senator Exon's views were echoed by a large number of Democrats, leaving considerable doubt as to whether supporters of S. 4 would have enough votes to invoke

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<sup>18</sup> *Ibid.*, p. 17.

<sup>19</sup> *Ibid.*

cloture. Most Democrats sought only to provide the President the type of expedited authority described in S. 14. However, changes to that bill in a mark-up session weakened support from some key Democrats, like Exon, leaving final passage of any type of item veto legislation likely to falter on the Senate floor.

The Budget Committee accepted a substitute for S. 14, which had some distinct differences from the original legislation. In the original bill, the President would have the power to rescind "any budget item." That term was defined to mean, 1) An amount, in whole or in part, of budget authority provided in an appropriations act; 2) a targeted tax benefit; or, 3) an amount of direct spending. Of the House proposal (H.R. 2) and the two main Senate proposals (S. 4 and S. 14), this was the first to provide the President with the authority to rescind new entitlement spending. Additionally, targeted tax benefits were broadly defined as "any provision which has the practical effect of providing a benefit in the form of a different treatment to a particular taxpayer or limited class of taxpayers." This language would give the President tremendous authority to deny special interest tax breaks, seen by many Democrats as an essential part of any expanded rescission measure.

The substitute had taken out each of these provisions and during the markup session amendments were offered to include them again. Senator Exon offered an amendment to make the legislation apply to targeted tax benefits which passed by a vote of 12-10. A later amendment was offered to define targeted tax benefits along the lines of the H.R. 2 definition, which applied to 100 or fewer beneficiaries. The amendment was agreed to by a vote of 12-10 again, but Senator Exon voted against it, stating that it would cause a "proliferation of new tax loopholes [which] is the last thing America needs."<sup>20</sup> Finally, language allowing the President to rescind new direct spending was left out of the bill. The committee reported it favorably on a vote of 13-8, as amended and without recommendation, just as it had with S. 4.<sup>21</sup>

Both measures were reported out of the Committee on Governmental Affairs, which held hearings on February 23, followed by a markup session on March 2. No amendments were made to S. 4, and it was reported without recommendation by voice vote.<sup>22</sup> S. 14 was amended slightly to preclude the President from canceling or reducing any

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<sup>20</sup> U.S. Congress, Senate, Committee on the Budget, Rept 104-10, Feb 27, 1995, p. 23.

<sup>21</sup> *Ibid.*, p. 18.

<sup>22</sup> U.S. Congress, Senate, Committee on Governmental Affairs, Rept 104-13, Mar 7, 1993, p. 6.

budget authority for the Social Security Administration. The amendment was agreed to and the bill was reported without recommendation by a vote of 13-2.<sup>23</sup>

### C. PASSAGE IN THE SENATE

As both proposals moved to the floor, it became apparent that S. 4 would not be able to muster the necessary votes to override a filibuster by Democrats, who were overwhelmingly against the measure. Because Republicans held only a slim majority, Democrats would be able to stifle their attempts to bring S. 4 to a vote and could force a vote on S. 14, which they more generally favored. On March 7, when Senator Byrd(D) threw his support behind S. 14, Republicans realized that the battle for the stronger enhanced rescissions measure (S. 4) was lost. Having already failed to pass the Balanced Budget Amendment, the Majority Leader, Senator Bob Dole(R) now saw passage of another key Republican issue threatened.<sup>24</sup>

Once he realized the measure would fail, Senator Dole moved to end the division within the Republican Party and encouraged McCain and Domenici to reach a compromise. The nature of the compromise took the form of a separate

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<sup>23</sup> U.S. Congress, Senate, Committee on Governmental Affairs, Rept 104-14, Mar 7, 1993, p. 6.

<sup>24</sup> Taylor, Andrew, 1995, "Faced with Impasse, GOP Offers Line-Item Veto Compromise," Congressional Quarterly, (Mar 11), p. 743.

enrollment measure similar to the one that had died to a filibuster in 1985. The bill would come to the floor as S. 4, but would be an entirely different piece of legislation than the one that had passed in committee. On March 20, when the legislation was called to the Senate floor for debate, it was called as a substitute amendment in the nature of the separate enrollment compromise measure.<sup>25</sup>

Though the separate enrollment bill was subject to heated rhetoric from some Democrats due to its origination and lack of committee hearings, it drew relatively strong bipartisan support. Debate on the bill moved quickly, unlike the Balanced Budget Amendment, which had occupied the whole Senate for nearly the entire month of February.<sup>26</sup> On the 23<sup>rd</sup>, when a roll call vote was ordered, the measure passed by a huge margin of 69-29, with Republicans voting 50-2 in favor and Democrats voting 19-27 against.<sup>27</sup>

The success of the substitute measure can be attributed in part to President Clinton's support. Having called for the line item veto since his campaign, he added his influence during the Senate debate by calling on

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<sup>25</sup> *Congressional Record*, (Mar 20, 1995), p. S4188.

<sup>26</sup> Taylor, Andrew, 1995, "Faced with Impasse, GOP Offers Line-Item Veto Compromise," Congressional Quarterly, (Mar 11), p. 743.

<sup>27</sup> *Congressional Record*, (Mar 23, 1995), p. S4484.



Congress to pass the "strongest possible line item veto."<sup>28</sup> To attract wavering Republicans and conservative Democrats, the drafters also included targeted tax breaks and new entitlement spending as legitimate targets for the President's item veto.<sup>29</sup>

According to the substitute for S. 4, every appropriation or authorization measure that passed both Houses of Congress would then be disaggregated and treated as a separate bill, with a distinct bill number. These smaller bills would then be voted on en bloc and would not be subject to amendment. After final passage in each House, the separate bills would be presented to the President. The President could then approve or disapprove each bill. Congress could overturn the President's veto with a two-thirds vote in each House.

Despite the support the legislation enjoyed, it was still seen by many Democrats as a cumbersome mechanism that could not possibly be instituted. Senator Byrd considered the tremendous task when he spoke against the measure on March 21<sup>st</sup>.

The passage of a single appropriation bill by both Houses would be followed by a cut-and-paste

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<sup>28</sup> Taylor, Andrew, 1995, "Line-Item Veto Compromise Easily Passes Senate," Congressional Quarterly, (Mar 25), p. 854.

<sup>29</sup> Taylor, Andrew, 1995, "GOP Reaches Pact on Line-Item Veto," Congressional Quarterly, (Mar 18), p. 798.

operation in the office of the enrolling clerk of the originating body, and out of the wee hours of the night, the fructifying wet pen, the scissors and paste and the whiz of the computer of the enrolling clerk and his staff, would pour out a vast litter of mini-bills, or 'billettes,' not a single one of which had been passed by either body of Congress.<sup>30</sup>

Another major problem with the separate enrollment legislation was that it took away flexibility from executive branch agencies to reprogram funds within an appropriation. Under the new law, all the language specifying the purpose for which the funds were appropriated would be written directly into the bill, rather than in the report that accompanied the bill. Since this language would now be signed into law, the money would have to be spent according to the specific language in the bill. According to Senator Sam Nunn(D), Ranking Member on the Senate Armed Services Committee, the inability to reprogram funds would be devastating to the Department of Defense.

The Department of Defense routinely reprograms funds between various lines in the Appropriations Committee reports without any congressional involvement. . . because there are certain programs that get behind schedule--they cannot be completed on time. Therefore, the money is not needed as originally anticipated. The money is needed somewhere else.<sup>31</sup>

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<sup>30</sup> *Congressional Record*, (Mar 21, 1995), p. S4227.

<sup>31</sup> *Ibid.*, (Mar 22, 1995), p. S4343.

Realizing they lacked the votes to sustain a filibuster, the Democratic leadership instead offered several amendments to modify the final version of the bill. Senator Bradley(D) offered an amendment to redefine targeted tax breaks more broadly, which was voted down 50-48. Senator Daschle(D) offered an expedited rescissions substitute, which was tabled on a vote of 62-38. Senator Byrd(D) offered an amendment to prevent any savings from the President's rescissions to be used for tax cuts, which failed when a point of order was raised against it. The point of order was sustained on a vote of 49-48.<sup>32</sup>

Each House had passed extremely different versions of expanded rescissions bills. Even as the Senate bill passed, Republicans in the House of Representatives were expressing their dislike for it. The Republican leadership now had the difficult task of drafting legislation that could be sent to the President. This task would become increasingly difficult, as the President and the Congress became entrenched in a bitter fight over the budget. These challenges would keep final passage of the line item veto from occurring for another year.

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<sup>32</sup> Taylor, Andrew, 1995, "Line-Item Veto Compromise Easily Passes Senate," Congressional Quarterly, (Mar 25), pp. 856, 896.

#### D. LINE ITEM VETO AND THE BUDGET BATTLE

As the political battle over balancing the budget heated up, Republicans became less eager to provide new powers to the President in the form of the line item veto. The Republican leadership's desire to balance the budget in seven years was attacked by Democrats and President Clinton, who sought a ten-year plan. This conflict led, in June, to President Clinton's first veto. During the first session of the 104<sup>th</sup> Congress, ten more vetoes would follow as the budget battle pushed other legislation to the periphery.<sup>33</sup>

Neither the Senate nor the House of Representatives moved quickly to conference. In an attempt to break the standstill, the House of Representatives called up the Senate bill (S. 4) on May 17. Stating the intent of the House leadership to move the measure "one step closer toward conference and long awaited enactment," Representative Bill Clinger(R) substituted S. 4 with the text from the House-passed bill H.R. 2.<sup>34</sup> By substituting

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<sup>33</sup> Kehoe, Mark T., 1996, "Clinton Veto Tally: Up to 11," Congressional Quarterly, (Jan 6), p. 10.

<sup>34</sup> Congressional Record, (May 17, 1995), p. H5090.

the language of H.R. 2 into S. 4, the House was making the statement that the Senate-passed bill was unacceptable.<sup>35</sup>

By early June, President Clinton had become disquieted about the lack of progress on the line item veto. He used his veto of a rescissions and spending package (H.R. 1158) to jab at the Congress for their lack of progress on the measure.

President Reagan was for it. President Bush was for it. The House passed it on President Reagan's birthday. They talked about what an urgent thing it was. Now they say they don't think they ought to give it to me this year because I might use it. . . But I'll make them a deal: If they'll send me the line-item veto this year, I will not line-item any tax cuts they sign. If they pass all these big tax cuts and wreck education and Medicare to cut taxes, I'll veto the whole thing.<sup>36</sup>

Concerns within the Republican Party over President Clinton's possible use of the new measure had begun appearing in various news accounts as well. His comments helped put the spotlight on the stark differences between House and Senate proposals. The President's remarks were aimed at re-focusing the Republican leadership's attention on one of the few items of legislation that he and they mutually supported.

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<sup>35</sup> Palmer, Elizabeth A., and Taylor, Andrew, 1995, "House Pushes Negotiations on Line-Item Veto," Congressional Quarterly, (May 20), p. 1409.

<sup>36</sup> Clinton, William J., "Remarks by the President on Safe and Drug-Free Schools," Jun 7, 1995.

Meanwhile, Democrats in Congress continued levying charges of Republican foot-dragging. On June 20<sup>th</sup> Senator Dole acted to get the process moving again by bringing the measure to the floor to appoint conferees.<sup>37</sup> However, a date for the conference was still not set. On August 1<sup>st</sup>, Senate Democrats pushed a sense-of-the-Senate resolution to the floor which urged the House of Representatives to appoint conferees. The measure was agreed to 83-14.<sup>38</sup>

The Speaker of the House, Newt Gingrich(R), continued to assert that the impasse could be resolved before the end of the year. He stated his plans to designate conferees following Congress' August recess.<sup>39</sup> On September 7<sup>th</sup> the House appointed its conferees, and passed a motion to instruct them to urge the Senate to adopt the House amendment to S. 4.<sup>40</sup>

The Conference committee met for the first time on September 27. After the meeting, conferees expressed the deep division between the two Houses. Representative Gerald Solomon(R) stated that "a quick melding of the two versions is virtually impossible."<sup>41</sup> Echoing his

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<sup>37</sup> *Congressional Record*, (Jun 20, 1995) p. S8718.

<sup>38</sup> Taylor, Andrew, 1996, "GOP Renews Drive on Line-Item Veto," *Congressional Quarterly*, (Aug 5), p. 2346.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Congressional Record*, (Sep 7, 1995), pp. H8605-8608.

<sup>41</sup> Freedman, Allan, 1995, "Major Disputes Face Conference on Line-Item Veto Measure," *Congressional Quarterly*, (Sep 30), p. 2978.

sentiments, Representative Clinger, the chairman of the conference, stated that he didn't think anything could realistically be accomplished before the middle of November.<sup>42</sup>

By their second meeting, Senate conferees had moved much closer to accepting the House version of the bill. While Republican senators moved slowly toward accepting the enhanced rescission framework, they insisted on a sunset provision. The issue was strongly opposed by House conferees.<sup>43</sup>

Though conferees hoped to finish their report before the end of the year, the prospects of that were fading. The budget battle between Congress and the President was pushing passage of the measure to the periphery. By December, when the President vetoed the Republican reconciliation bill, the push to pass the line item veto in 1995 ended. Without another scheduled meeting of the conferees the line item veto was pushed into the second session.

The budget battle continued well into 1996, with the Federal government operating on a series of continuing

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<sup>42</sup> Ibid.

<sup>43</sup> Taylor, Andrew, (1995), "Senate May Give In on Line-Item Veto," Congressional Quarterly, (Nov 11), p. 3446.

resolutions. Conservative Republicans in the House were also threatening to vote down a must-pass debt limit increase package. The resulting uproar pushed consideration of the line item veto into March, when Senator Dole urged conferees to work out their differences. The compromise agreement was based largely upon the House-passed enhanced rescissions bill. Senate conferees, however, received the sunset provision they had wanted. Additionally, the measure would apply to new or expanded entitlement spending.<sup>44</sup> Official agreement was reached on March 21<sup>st</sup> with a majority of conferees agreeing to the conference report (S. 4- H. Rept. 104-491).<sup>45</sup>

The Senate agreed to the conference report on March 27<sup>th</sup>, by a vote of 69-31.<sup>46</sup> The House had originally intended to attach the measure to the \$4.9 trillion dollar debt limit increase bill. Ultimately the House leadership attached it to H.R. 391 which was the rule for H.R. 3136, the Senior Citizen's Right To Work Act of 1996. The rule stated that if the Senate agreed to the conference report on S. 4 by March 30<sup>th</sup>, then it would be considered as passed

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<sup>44</sup> Taylor, Andrew, (1996), "Republicans Break Logjam on Line-Item Veto Bill," Congressional Quarterly, (Mar 16), p. 687.

<sup>45</sup> Taylor, Andrew, (1996), "GOP Negotiators Agree on Line-Item Veto," Congressional Quarterly, (Mar 23), p. 779.

<sup>46</sup> *Congressional Record*, (Mar 27, 1996), p. S2995.



in the House of Representatives. With the passage of the rule, and upon notification from the Senate of final passage of S. 4, the measure was passed and subsequently separated from the rule, H.R. 391. The rule passed the House on March 28<sup>th</sup>, by a vote of 232-177.<sup>47</sup>

President Clinton signed the Line Item Veto Act into law on April 9, 1996 as P.L. 104-130. At the signing ceremony, President Clinton praised the bipartisan effort that was necessary to pass the legislation. He went on to explain the importance of the measure in controlling spending.

For years, presidents of both parties have pounded this very desk in frustration at having to sign necessary legislation that contained special interest boondoggles, tax loopholes and pure pork. The line item veto will give us a chance to change that, to permit presidents to better represent the public interest by cutting waste, protecting taxpayers and balancing the budget.<sup>48</sup>

From President Grant's call for the line item veto, until President Clinton signed the measure into law, 123 years had passed. Though the measure could not be used until January 1, 1997, possibly after President Clinton's tenure had ended, he clearly enjoyed signing the measure into law. In doing so, he acknowledged all of the recent

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<sup>47</sup> *Congressional Record*, (Mar 28, 1996), p. H2986.

<sup>48</sup> Clinton, William J., "Remarks by the President at Signing of Line Item Veto Bill," Apr 9, 1996.

presidents who had sought the measure. On Capitol Hill, the line item veto continued to draw fire from opponents such as Senator Robert Byrd. But for now, supporters enjoyed the accomplishment.

#### **IV. USE OF THE LINE ITEM VETO DURING THE 105<sup>th</sup> CONGRESS**

Following his reelection in 1996, Bill Clinton became the first President to exercise the Line Item Veto. In doing so, he discovered the limits inherent in its use. For example, each cancellation brought a corresponding reduction in discretionary spending limits. Because of this, the President had to consider the long-term affects of each cancellation on his spending priorities. Also, each time he canceled an item he drew fire from congressmen of both parties, who saw their specific programs voided. Though in the final analysis his use of the Line Item Veto was limited, it influenced some long-time supporters to turn in opposition to the measure, while opponents reveled in the appearance that they had been right all along.

##### **A. PREPARING TO USE THE LINE ITEM VETO**

From the start of the 105<sup>th</sup> Congress, the Line Item Veto Act came under fire from opponents, led by Senator Robert Byrd, who sought to have the measure repealed in federal court. Though legal challenges to the Act will be fully discussed in the following chapter, it is important to realize the impact of lingering legal questions on the President's use of the measure. While the court challenge met with some initial success in Federal District Court, it

ultimately failed in mid-summer, when the Supreme Court ruled that the plaintiffs did not have standing to bring suit against the act.<sup>1</sup> The justices' decision, however, did not answer the constitutional questions regarding the Act.

As President Clinton considered using the Line Item Veto, he had to contemplate whether his cancellations would ultimately be negated by the Supreme Court. Because of this, many of his advisors cautioned him to use the measure only on appropriations bills, which they determined placed him on more solid legal ground. This was because the President's power to rescind budget authority was firmly established in U.S. history. Presidents had regularly used their role as Chief Executive to refuse or delay the spending of budget authority. The 1974 Budget Act was simply the last attempt to quantify that power, and the President's new enhanced rescission authority was rooted in that Act.

In providing the power to cancel targeted tax benefits, however, the Line Item Veto Act was delegating a new power to President Clinton which had no precedent in U.S. history. Presidents had never been able to unilaterally change the tax code. Since canceling targeted

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<sup>1</sup> Supreme Court of the United States, *Opinion of the Court*, "William J. Clinton, et al, Appellants v. City of New York et al," No. 97-1374, Jun 25, 1998, p. 1.

tax benefits was an entirely new grant of authority, the President's advisors felt it would be less likely to stand up to constitutional scrutiny.<sup>2</sup>

This dilemma soon confronted President Clinton. On August 5<sup>th</sup>, he signed two budget reconciliation bills into law. The first was the Balanced Budget Act of 1997 (P.L. 105-33); the second was the Taxpayer Relief Act (P.L. 105-34). The Balanced Budget Act included one limited tax benefit, while the Taxpayer Relief Act included 79 such benefits.<sup>3</sup> At a press conference the following day, President Clinton signaled his intention to review these special interest provisions carefully and, if necessary, to use the Line Item Veto on them. He first stated that he must clarify which items are legitimate targets for his item veto, and also that he would not veto any of those items which were part of the budget agreement. As for the rest he continued, "I will just go down and evaluate them and decide whether I think that they are sufficiently objectionable that they should be vetoed."<sup>4</sup>

President Clinton was moving to use the Line Item Veto for the first time regardless of the legal consequences for

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<sup>2</sup> Taylor, Andrew, and Rubin, Alissa J., 1997, "Clinton Weighs Politics, History In Decision To Use Veto Power," Congressional Quarterly, (Aug 9), p. 1917.

<sup>3</sup> Ibid., pp. 1915-1917.

<sup>4</sup> Clinton, William J., "Press Conference by the President," The White House, Aug 6, 1997.

the Act. While doing so would draw broad public support, congressional reaction was uncertain. By August 8<sup>th</sup>, his staff had narrowed down the large number of provisions subject to the Line Item Veto considerably.<sup>5</sup>

#### **B. PRESIDENT CLINTON EXERCISES THE LINE ITEM VETO**

On August 11<sup>th</sup>, President Clinton exercised the Line Item Veto for the first time in history on two provisions from the Taxpayer Relief Act and one provision from the Balanced Budget Act. From the Taxpayer Relief Act, the President canceled two limited tax benefits. The first cancellation, designated 97-1, was a provision that would have allowed various businesses to defer taxes on certain types of overseas income for up to one year. In canceling this provision the President stated that such an exemption would create "tax-haven abuses" and provide "preferential tax treatment to a limited group of taxpayers."<sup>6</sup>

The President's second cancellation targeted a provision to allow the deferral of taxes on gains related to the sale of food processing equipment to certain farmers' cooperatives. The provision was intended to provide an exemption to a Texas businessman named Harold

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<sup>5</sup> Taylor, Andrew, and Rubin, Alissa J., 1997, "Clinton Weighs Politics, History In Decision To Use Veto Power," Congressional Quarterly, (Aug 9), p. 1915, 1916.

<sup>6</sup> *Message from the President of the United States*, "Cancellation of Limited Tax Benefit," House Document 105-116, Sep 3, 1997, p. 4.

Simmons. The exemption would allow Simmons to transfer food-processing facilities from his Almagamated Sugar Corporation to a cooperative of sugar-beet farmers called the Snake River Sugar Company.<sup>7</sup> Although President Clinton stated that he wanted to encourage "value-added" farming through similar arrangements, this particular item was being canceled for two specific reasons.

First, the canceled item would have created opportunities for complete avoidance of tax on the gain from a sale of a refiner or processor because it lacks the safeguards that apply to sales of stock to [Employee Stock Ownership Plans]. Second, [it] failed to target its benefits to small-and-medium-size cooperatives.<sup>8</sup>

In addition to these two targeted tax breaks, President Clinton canceled one spending measure from the Balanced Budget Act. The State of New York had been in a long-running dispute with the federal government over matching funds for Medicaid services. Prior to 1991, several state governments levied taxes against health care providers for the purpose of increasing Medicaid matching funds from the federal government. The law was changed to require that, in order to be eligible for reimbursement, taxes must be "broad-based" and apply uniformly to all

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<sup>7</sup> Weisman, Jonathan, 1997, "Vetoed Provisions-Farmers Co-Ops," Congressional Quarterly, (Aug 16), p. 1954.

<sup>8</sup> *Message from the President of the United States*, "Cancellation of Limited Tax Benefit," House Document 105-116, Sep 3, 1997, p. 5.

providers. While New York claimed that its taxes met this definition, the Health Care Financing Administration, which administers Medicaid, disagreed and withheld those funds.<sup>9</sup>

In an effort to end the dispute, New York's Senators Alfonse D'Amato(R) and Patrick Moynihan(D) inserted a provision into the Balanced Budget Act which provided a waiver of the 1991 law. Under the waiver, any taxes, fees or assessments levied by New York would be eligible for reimbursement, provided they were enacted prior to June 1, 1997. President Clinton vetoed this provision, stating it would establish "a costly precedent for other states to request comparable treatment."<sup>10</sup>

Congressional reaction to the President's vetoes varied considerably. Some congressmen felt that the President had simply asserted his prerogative. Others, who witnessed their specific provisions vetoed, suggested that the President had blind-sided them by singling out those provisions. Representative Charles Stenholm(D), who had fought for the food-processing tax-exemption, explained that he felt he had saved it from the President's veto

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<sup>9</sup> Carey, Mary A, 1997, "Vetoed Provisions-New York Aid," Congressional Quarterly, (Aug 16), p. 1955.

<sup>10</sup> *Message from the President of the United States*, "Cancellation of Item of New Direct Spending," House Document 105-115, Sep 3, 1997, p. 4.



after speaking with him about the provision on August 10<sup>th</sup>.<sup>11</sup> As for the New York Medicaid provision, a spokesman for the House Commerce Committee disagreed with the President's view that it was not part of the budget agreement. He stated that the Administration had even made counter-proposals on the issue.<sup>12</sup>

In the end, however, Congress did little to reverse the President's vetoes. While disapproval bills were introduced in both houses to override the cancellations, prospects for overturning them were slim. Senator Moynihan introduced the first bill (S. 1144) on September 3<sup>rd</sup>, to disapprove the cancellation of the New York Medicaid provision. Then on September 9<sup>th</sup>, three more disapproval bills were introduced (H.R. 2444, S. 1157, H.R. 2436) in Congress. Each house had taken the procedural steps to disapprove the President's rescissions, but the bills would never move to a floor vote.

The President's first use of the Line Item Veto had come on the heels of an in-house debate between his advisors over whether he should be cautious with the

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<sup>11</sup> Weisman, Jonathan, 1997, "Vetoed Provisions-Farmers Co-Ops," Congressional Quarterly, (Aug 16), p. 1954.

<sup>12</sup> Carey, Mary A, 1997, "Vetoed Provisions-New York Aid," Congressional Quarterly, (Aug 16), p. 1955.

measure or use it to send a strong signal to Congress.<sup>13</sup> The President clearly opted for caution, striking only 2 of 80 possible targeted tax benefits. Congressional reaction was limited to criticizing President Clinton for his choices, but there was no consensus among congressmen to overturn those cancellations. He had successfully avoided the rhetoric of partisanship by canceling provisions supported by members of his own party. The introduction of disapproval legislation proved as symbolic as President Clinton's limited use of the Line Item Veto. However, the ease with which he exercised his new authority would not extend to his next group of cancellations.

### **C. CANCELLATIONS MADE BY THE PRESIDENT IN 1997**

President Clinton used his new authority to cancel a total of 82 provisions from 11 laws in 1997. Of those cancellations, 79 were spending measures within nine regular appropriations acts. The remaining cancellations came from the two reconciliation acts described in the previous section. The Congressional Budget Office estimated all canceled items to total \$355 million in 1998 outlays, and \$937 million over five years. Table (4) provides budget authority and outlay amounts for each

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<sup>13</sup> Taylor, Andrew, 1997, "Clinton Finds New Veto Power Too Tempting To Postpone," Congressional Quarterly, (Aug 16), p. 1951.

cancellation between 1998 and 2002. Table (5) provides 1998 budget authority, by appropriations act, as a percentage of overall discretionary spending.<sup>14</sup>

Cancellations by the President were insignificant compared to the overall size of the federal budget for 1998. When viewed against overall discretionary budget authority, the President's cancellations were almost negligible, totaling only 0.09 percent. This is the appropriate comparison because while the Act allows the President to strike items of new direct spending, it does not give him the power to strike spending from previously enacted entitlements such as Social Security and Medicare which make up the fastest growing portions of the federal budget.<sup>15</sup>

Entitlements and other mandatory spending currently encompass approximately two-thirds of all federal spending while discretionary spending makes up only the other one-third. Since the Line Item Veto can not affect the amount of federal spending in these mandatory programs, there is little value in measuring its impact on overall spending. Consequently, consideration of the impact of the Line Item

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<sup>14</sup> Congressional Budget Office, 1998, "The Line Item Veto Act After One Year," CBO Memorandum, (April), pp. 11-14.

<sup>15</sup> Congressional Budget Office, 1997, "Reducing the Deficit: Spending and Revenue Options," *Report to the Senate and House Budget Committees*, (March), pp 211-213.

Veto on discretionary spending provides the best gauge of the effectiveness of the new measure.

**Table (4)**  
**Cancellations Under the Line Item Veto Act<sup>a</sup>**

Cancellation	Act	Budget Category	Amount Canceled					
			1998	1999	2000	2001	2002	
Spending Cancellations								
97-								
1	Balanced Budget Act of 1997	BA	-200	0	0	0	0	
		O	-200	0	0	0	0	
4-41	Military Construction	BA	-287	0	0	0	0	
	Appropriations Act of 1998	O	-28	-102	-79	-46	-16	
42-55	Defense Appropriations Act	BA	-144	0	0	0	0	
		O	-73	-49	-12	-4	-4	
56	Treasury Appropriations Act	BA	2	12	13	13	14	
		O	2	12	13	13	14	
57-64	Energy and Water Act	BA	-19	0	0	0	0	
		O	-12	-4	c	0	0	
65-71	Veterans, HUD Appropriations Act	BA	-14	0	0	0	0	
		O	-7	-6	-1	-4	a	
72-74	Transportation Appropriations Act	BA	-6	0	0	0	0	
		O	-2	-3	0	0	0	
75-76	Interior Appropriations Act	BA	-2	-1	-1	-1	-1	
		O	-2	-1	-1	-1	-1	
77-81	Agriculture Appropriations Act	BA	-2	0	0	0	0	
		O	a	-2	a	a	0	
82	Commerce, Justice Appropriations Act	BA	-5	0	0	0	0	
		O	-4	-1	a	0	0	
Total Spending Cancellations			BA	-677	11	12	12	13
			O	-326	-156	-80	-39	-7

(Continued)

**Tax-Benefit/Revenue Cancellations**

2-3	Taxpayer Relief Act of 1997	REV	25	136	8	5	4	
56	Treasury Appropriations Act	REV	4	35	37	37	38	
Total Tax/Revenue Cancellations			REV	29	171	45	42	42

**All Cancellations**

Total Budgetary Effect	b	-355	-327	-125	-81	-49
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**Cancellations Overturned**

4-41	Military Construction	BA	287	0	0	0	0	
	Appropriations Act	O	28	102	79	46	16	
56	Treasury Appropriations Act	BA	-2	-12	-13	-13	-14	
		O	-2	-12	-13	-13	-14	
Total Budgetary Effect Overturned			b	30	125	103	70	40

**All Cancellations Except Those Overturned**

Net Budgetary Effect as of 3/31/98	b	-325	-202	-22	-11	-9
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SOURCE: Congressional Budget Office.

NOTES: Numbers may not add up to totals because of rounding.

BA: budget authority; O: outlays; REV: revenues;

HUD: Department of Housing and Urban Development.

a. Less than \$500,000

b. Outlays minus revenues (excludes budget authority)

c. Amounts expressed in millions of dollars. Negative numbers indicate a decrease in the deficit or an increase in the surplus.

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The two bills that became the focus for most of the President's cancellations were the Military Construction Appropriations Act and the Defense Appropriations Act. Out of a total of 79 cancellations of discretionary budget authority, 52 came from these two bills. They also

accounted for \$431 million out of \$477 million in canceled discretionary budget authority for the year.<sup>16</sup>

**Table (5)**  
**Cancellations as a Percentage of**  
**Total Discretionary Spending for FY98**

<b>Appropriations Act</b>	<b>Number of Cancellations</b>	<b>BA Canceled<sup>a</sup></b>	<b>Total BA<sup>a</sup></b>	<b>Percent</b>
Agriculture	5	-2	13,751	0.01%
Commerce, State, Justice	1	-5	31,280	0.02%
Defense	14	-144	247,512	0.06%
District of Columbia	0	0	855	0%
Energy and Water				
Development	8	-19	20,732	0.09%
Foreign Operations	0	0	13,147	0%
Interior	2	-2	13,799	0.01%
Labor, Education, HHS	0	0	80,403	0%
Legislative Branch	0	0	2,251	0%
Military Construction	38	-287	9,183	3.13%
Transportation	3	-6	12,411	0.05%
Treasury, Postal <sup>b</sup>	1	2	12,735	0.02%
Veterans	7	-14	68,575	0.02%
<b>Total</b>	<b>79</b>	<b>-477</b>	<b>526,634</b>	<b>0.09%</b>

SOURCE: Congressional Budget Office

NOTES: This table does not include actions overturning  
Cancellations  
HHS: Department of Health and Human Services;  
HUD: Department of Housing and Urban Development.

- a. Amounts are expressed in millions of dollars  
b. This cancellation (97-56) would increase on-budget direct spending and revenues (the revenue effects are not included).

Of the nine regular appropriations acts, the only one that was significantly affected by the President's veto was the Military Construction Appropriations Act. Out of a total of \$9.18 billion in budget authority, the President

<sup>16</sup> Ibid.

canceled \$287 million, or just over 3 percent.<sup>17</sup> While this was still just a small fraction of military construction spending, it was significantly greater than the amounts canceled in any of the other eight effected appropriations acts. It also drew the most widespread outrage from Congress and resulted in the passage of the only disapproval bill. The only other cancellation overturned, prior to the Line Item Veto Act being ruled unconstitutional by the Supreme Court, was a provision from the Treasury Appropriations Act. This provision, which dealt with the Federal Employees Retirement System, was overturned by the D.C. District Court in January of 1998.<sup>18</sup>

In total, President Clinton sent eleven special messages to Congress. Table (6) provides a brief description of each cancellation message. As a result of the President's cancellations, discretionary spending limits were reduced, over five years by \$196 million in budget authority. Approximately seventy-five percent of the spending cap reductions were applied to defense discretionary spending. Table (7) provides a comparison between OMB and CBO estimates of adjustments to discretionary spending caps.

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<sup>17</sup> Ibid., p. 14.

<sup>18</sup> Ibid., p. 15.

**Table (6)**  
**Special Messages in 1997**

<b>Date of Line Item Veto</b>	<b>Act</b>	<b>Cancellation Number</b>	<b>House Document</b>
8/11/97	Taxpayer Relief Act	1-2	105-116
8/11/97	Balanced Budget Act	3	105-115
10/6/97	Military Construction Appropriations Act	4-41	105-147
10/14/97	Defense Appropriations Act	42-55	105-155
10/16/97	Treasury Appropriations Act	56	105-156
10/17/97	Energy and Water Appropriations Act	57-64	105-157
11/1/97	Veterans, HUD Appropriations Act	65-71	105-167
11/1/97	Transportation Appropriations Act	72-74	105-168
11/20/97	Interior Appropriations Act	75-76	105-180
11/20/97	Agriculture Appropriations Act	77-81	105-179
12/2/97	Commerce, Justice Appropriations Act	82	105-181

SOURCE: Congressional Budget Office, Congressional Quarterly and computer-aided search of the Thomas website.

The Line Item Veto provided a new dynamic in the budgeting process. While President Clinton's use of the measure was limited, his administration used the threat of cancellations to push their spending priorities. Reports from private negotiations between administration officials



and congressional aides describe the veiled attempts for quid pro quo arrangements over spending priorities.<sup>19</sup> One such example occurred on the Defense Appropriations Act, where the Clinton Administration sought funding for "dual-use" technologies. Administration officials gave their proposal to Representative John P. Murtha(D), who explained his interpretation of the Administration's tactics:

It was very carefully handled so that there weren't any agreements made. It was just conversation, which made it look like things would be worked out if they got their money.<sup>20</sup>

Negotiations such as this led an exasperated James Dyer, the staff director of the House Appropriations Committee, to exclaim, "I've said it 20 times: Don't come in here threatening me with the Line Item Veto. Just go use it."<sup>21</sup>

The overall success of these tactics is difficult to discern. One view may be that the limited use of the measure demonstrates that it proved an effective negotiating tool. There is, however, not currently enough information available to conclude this. It also becomes difficult to gauge due to a variety of factors that the President had to weigh prior to making a cancellation.

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<sup>19</sup> Taylor, Andrew, 1997, "With CR Done, Focus Now is on Line-Item Veto," Congressional Quarterly, (Oct 4), p. 2387.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid., p. 2388.

Each time President Clinton exercised the Line Item Veto, congressmen who lost specific programs complained that the Administration had misused the measure in some way. The President had to ensure that he ultimately maintained the support of Democratic congressmen, while not being viewed as overly partisan by Republicans.

**Table (7)**  
**Adjustments to Discretionary Spending Caps**  
**Due to Line Item Vetoes**

Agency	Budget Category	1998	Adjustment Amounts			
			1998	2000	2001	2002
<b>Defense Caps</b>						
CBO	Budget Authority	-144	0	0	0	0
	Outlays	-73	-49	-12	-4	-4
OMB	Budget Authority	-144	0	0	0	0
	Outlays	-71	-50	-14	-5	-2
<b>Nondefense Caps</b>						
CBO	Budget Authority	-48	-1	-1	-1	-1
	Outlays	-27	-17	-2	-2	-1
OMB	Budget Authority	-49	-1	-1	-1	0
	Outlays	-19	-22	-5	-4	-2
<b>Total Discretionary Spending Cap Adjustments</b>						
CBO	Budget Authority	-192	-1	-1	-1	-1
	Outlays	-100	-66	-14	-6	-5
OMB	Budget Authority	-193	-1	-1	-1	0
	Outlays	-90	-72	-19	-9	-4
SOURCE:	Congressional Budget Office; Office of Management and Budget.					
NOTE:	The adjustment amounts exclude cancellations nullified as of March 31, 1998.					

President Clinton also had to consider reductions in the spending caps, prior to making a cancellation. The "lockbox" mechanism, which prevented the President from re-

directing budget authority to other programs, may have served as the most important factor in limiting his use of the Line Item Veto. Congress, which also sought to avoid reductions in the spending caps, had to consider the President's new authority, before sending him legislation. As a result, both the President and Congress were encouraged to compromise, if possible.<sup>22</sup>

One year does not provide sufficient experience to judge the extent of the shift in budgetary powers resulting from the Line Item Veto Act. It is apparent that the measure introduced a new dynamic into the budgeting process, but to what extent it added power to the President's position relative to Congress is uncertain. According to the Congressional Budget Office, one of the new dynamics was the increase in importance of the President's budget submission. That dynamic is evident from the fact that the primary reason given for cancellations made by the President was that the item had not been requested in his budget.<sup>23</sup>

Limits on the extent of the shift in power to the President became evident early. The ability of Congress to

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<sup>22</sup> Congressional Budget Office, 1998, "The Line Item Veto Act After One Year," CBO Memorandum, (April),

pp. 24.

<sup>23</sup> Ibid., p. 26.

overturn cancellations in popular legislation placed the most direct limits on presidential authority. Congress used this authority to reverse 38 of the President's 82 cancellations. To better understand the events associated with congressional reversal of the President's vetoes, these cancellations will now be considered in detail.

#### **D. TWO METHODS OF DISAPPROVAL**

Declaring that "the old rules have changed," President Clinton used the Line Item Veto on October 6<sup>th</sup> to cancel 38 items from the Military Construction Appropriations Act (P.L. 105-45).<sup>24</sup> In his most significant use of the new measure, Clinton targeted programs that met three criteria. Franklin Raines discussed these criteria at a press conference following the President's veto.

First, none of [the projects] were in the President's 1998 budget request for military construction. Second, we verified... that the design work necessary to begin construction on these projects has not started. And, third, none of [the] projects on the list made a substantial contribution to the well-being and quality of life of men and women in the Armed Forces.<sup>25</sup>

This was the first of 13 regular appropriations acts for fiscal year 1998 to reach the President. Following conference, the bill passed in the House of Representatives

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<sup>24</sup> Taylor, Andrew, 1997, "Line-Item Boosters Reconsider As Clinton Vetoes Hit Home," Congressional Quarterly, (Oct 11), p. 2459.

<sup>25</sup> Raines, Franklin, "Press Briefing by Gene Sperling and Franklin Raines," The White House, Oct 6, 1997.

by a vote of 413-12.<sup>26</sup> It passed the Senate the next day by a vote of 97-3.<sup>27</sup>

The \$9.18 billion spending measure was approximately \$800 million more than the President had requested and contained some 129 projects not listed in his budget.<sup>28</sup> Due to its strong bipartisan support, many congressmen had doubted whether President Clinton would exercise the Line Item Veto on any significant portion of the measure.

The President's decision to cancel projects from this popular measure had two immediate results. First, several congressmen who had voted in favor of the Line Item Veto Act withdrew their support for the measure. At a hastily convened meeting of the Senate Appropriations Committee to discuss the President's cancellations, Senators Larry Craig(R) from Idaho and Robert Bennett(R) announced their change of position. In withdrawing his support, Bennett stated, "I feel like I need to eat a little crow."<sup>29</sup> Several Democrats enjoyed the spectacle of Republicans backing down from their long-fought crusade; Senator Harry

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<sup>26</sup> *Congressional Record*, (Sep 16, 1997), p. H7320.

<sup>27</sup> *Congressional Record*, (Sep 17, 1997), p. S9447.

<sup>28</sup> Greenblatt, Alan, 1997, "Military Construction Add-Ons Could Prompt Line-Item Veto," *Congressional Quarterly*, (Sep 20), p. 2239.

<sup>29</sup> Taylor, Andrew, 1997, "Line-Item Boosters Reconsider As Clinton Vetoes Hit Home," *Congressional Quarterly*, (Oct 11), p. 2460.

Reid(D) acknowledged that "a part of me is gloating right now."<sup>30</sup>

The second result of President Clinton's cancellations was the wide spread outrage it drew from Congress. Since this appropriations act had benefited from such strong bipartisan support, both Democrats and Republicans shot back at the President for his cancellations. Many saw his cancellations as a direct assault on their responsibility to appropriate money. Senator Domenici(R) took issue with the President's suggestion that a program should be canceled if it had not been requested in his budget submission.

The argument is presented that if the President puts a project in his budget, it is a good project because it is in his budget. It is, therefore, sanctified by a presidential budget. I am very concerned that no other projects can be thus sanctified if they are Congress' intent.<sup>31</sup>

The committee was in overwhelming agreement that the President's use of the measure challenged their constitutional prerogatives. Most Democrats used the hearing to air long held grievances against the Line Item Veto. Senator Dale Bumpers announced that if the Supreme

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<sup>30</sup> Ibid.

<sup>31</sup> U.S. Congress, Senate, Committee on Appropriations, Evaluate the President's Use of the Line Item Veto Authority for Military Construction; Fiscal Year 1998 Appropriations, "Statement of Hon. Pete Domenici," Oct 9, 1997, p. 8. (Hereafter, 1998 *Hearings*).

Court sustained the measure, Congress' role would be reduced to such a degree that they could "go home and receive [their] pay through the mail."<sup>32</sup> Many Democrats, who echoed his view, saw the hearing as possibly a first step in repealing the measure.

Other aspects of the President's established criteria for canceling these programs drew significant fire. Congressmen attacked the Administration's assertion that the lack of design work for these projects would keep them from being started in 1998. In his opening statement, Senator Byrd(D) argued that the committee had been informed "on each and every project" by the Department of Defense, that they were executable in 1998. After considering the established criteria in detail, Byrd concluded that the reason for each cancellation was "basically capricious and that there [was] only a flimsy rationale for [their] selection."<sup>33</sup>

During the hearing, the committee heard testimony from Major General Gill (USA), Major General Lupia (USAF) and Rear Admiral Amerault (USN). Their testimony confirmed Senator Byrd's statements, revealing that only two of the vetoed projects actually had no design work initiated, and

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<sup>32</sup> Ibid., p. 12.

<sup>33</sup> Ibid., p. 3.

that the majority could be executed in fiscal year 1998.<sup>34</sup> General Lupia also testified that some projects, such as a dining facility for Malmstrom Air Force Base, should have been considered quality of life projects.

In some cases, the officers reported that erroneous information had previously been submitted to Congress or the Administration. One reason given for the error was the lack of clarification over just what was meant by "executable." General Gill stated that in his view, it meant whether a contract could be awarded, but the term was never clarified.<sup>35</sup>

Congress reacted swiftly to the President's cancellations. Two bills, H.R. 2624 and H.R. 2631, were introduced in the House of Representatives on October 7<sup>th</sup>. On October 9<sup>th</sup>, S. 1292 was introduced in the Senate. These bills intended to reverse all 38 cancellations. On November 8<sup>th</sup>, H.R. 2631 was debated on the floor of the House and passed by a vote of 352-64.<sup>36</sup> The Senate had passed S. 1292 on October 30, but later vitiated the action. It adopted H.R. 2631, which it passed on November 9<sup>th</sup>, by a vote of 69-30.<sup>37</sup>

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<sup>34</sup> *Ibid.*, pp. 18-20.

<sup>35</sup> *Ibid.*, p. 19.

<sup>36</sup> *Congressional Record*, (Nov 8, 1998), p. H10384.

<sup>37</sup> *Ibid.*, p. S12414.



Congressional outrage had caused the Administration to change its position to some degree. Admitting that they had made mistakes on some of the cancellations, Raines stated his commitment to "working with Congress to restore funding for those projects that were canceled as a result of inaccuracies in the data provided by the DoD."<sup>38</sup> Their new position, however, did not mean they were willing to accept all 38 of the vetoed projects. Since the disapproval bill restored funding for all canceled projects, President Clinton vetoed the bill on November thirteenth.

Congress adjourned sine die on November 13<sup>th</sup>, so no further action was taken on the President's veto in the first session. Congress did not consider the measure again until February of 1998. On February 5<sup>th</sup>, the House of Representatives voted to override the President's veto by a vote of 347-69.<sup>39</sup> The Senate considered the measure on February 25<sup>th</sup>, and by a vote of 78-20, voted to override the President's veto.<sup>40</sup> Though a significant period of time had passed, bipartisan support for the disapproval legislation had remained strong.

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<sup>38</sup> Cassata, Donna, 1997, "President Uses a Delicate Touch in Vetoing Military Spending," Congressional Quarterly, (Oct 18), p. 2557.

<sup>39</sup> Congressional Record, (Feb 5, 1998), p. H362.

<sup>40</sup> Ibid., (Feb 25, 1998), p. S1000.

This marked the only time that disapproval legislation was passed to override a presidential veto as defined in the Line Item Veto Act. The President's veto of the disapproval bill was also a first, as was the subsequent overturn of that veto. Together these events display the proper functioning of the Line Item Veto Act. Though the process took significantly longer than many had expected, it demonstrated clear limits on the President's ability to strike provisions from popular legislation.

The Line Item Veto Act also provided for expedited consideration in federal court for anyone adversely affected by it. This was the claim made by the National Treasury Employees Union after President Clinton used the Line Item Veto to cancel a provision that would have allowed 1.1 million federal employees to switch from the Civil Retirement System to the Federal Employees Retirement System (FERS).<sup>41</sup> Commonly referred to as the "FERS open season" provision, it was the single item canceled from the Treasury and General Government Appropriations Act (P.L. 105-61), which the President signed into law on October 10<sup>th</sup>.

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<sup>41</sup> Taylor, Andrew, 1997, "Opponents of Line-Item Veto Try Again for Redress in Court," Congressional Quarterly, (Oct 18), p. 2543.

Remarking on the cancellation, President Clinton stated that it would "save \$854 million over five years by preventing a hastily-conceived, undebated provision from becoming law."<sup>42</sup> Senator Stevens(R) had added the provision to the bill during conference and so debate on it was severely limited. According to the President, the provision would result in higher spending levels for government agencies, by forcing them to fund higher cost retirement programs for those individuals who switched to 'FERS.' At the same time, these agencies would lose revenue to fund retirement programs, since individuals who switched to FERS would no longer be contributing to the Civil Retirement System.

President Clinton listed the provision as an item of discretionary spending in his cancellation message. However, the Line Item Veto Act does not allow for the classification of reduced revenues as an item of discretionary spending. According to the Act, receipts can only be canceled if they qualify as limited tax benefits. This distinction became the basis of the NTEU's legal challenge. The Union filed suit immediately, arguing that

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<sup>42</sup> Clinton, William J., "Statement by the President," The White House, Oct 16, 1997.

the President had overstepped his authority by canceling the provision.<sup>43</sup>

The Department of Justice agreed to a settlement with NTEU in December. In accordance with the settlement, Judge Thomas Hogan issued an order nullifying the President's cancellations on January 6<sup>th</sup>, 1998. His order stated that the President "lacked authority under the Line Item Veto Act" to cancel the provision.<sup>44</sup>

These two methods of disapproval helped define the limits of the President's new authority. The vagaries within the law were being worked out either in federal court or in Congress. The President's attempts to overturn legislation that he disagreed with were clearly limited by Congress in this first year. Because of congressional passage of disapproval legislation and review in federal court, nearly half (39 out of 82) of the President's cancellations were overturned. Still, even some supporters of the Line Item Veto were having second thoughts about the Act.

Two more court cases were being considered by Judge Hogan that would ultimately make the Line Item Veto Act

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<sup>43</sup> Congressional Budget Office, 1998, "The Line Item Veto Act After One Year," CBO Memorandum, (April), pp. 21-22.

<sup>44</sup> Ibid.

unconstitutional. The cases would finally overcome the greatest hurdle that opponents of the Act had faced: proving they had legal standing to sue. Even though the Supreme Court would not consider the case until mid-summer, the President would not have another occasion to exercise his new power.



## **V. LEGAL CHALLENGES TO THE LINE ITEM VETO ACT**

Eager to reverse what he had failed to stop in Congress, Senator Byrd, along with five other congressmen, filed suit in the U.S. District Court for the District of Columbia one day after the Line Item Veto Act became effective. In accordance with language in the Act, which provided for expedited consideration in federal court to test its constitutionality, Byrd filed his case arguing that the Act violated the Presentment Clause of the Constitution.

In total, four cases would be brought against the Act before it was ultimately ruled unconstitutional by the Supreme Court. Each case would be subjected to rigorous scrutiny over whether the plaintiffs had legal standing to sue. Once standing was established, the justices would rule against the Act, stating that Congress does not have the authority to delegate such sweeping new power to the President. Though a few ardent supporters would vow to pass a new law, the Court's ruling brought to a close this important chapter in the history of the Line Item Veto.

### **A. EARLY CHALLENGES TO THE ACT**

When the National Treasury Employees Union filed suit over the President's cancellation of the FERS open season

provision, it also sought to have the Line Item Veto Act declared unconstitutional. As previously discussed, Judge Hogan's ruling on January 6, 1998, upheld an earlier agreement between the NTEU and the Department of Justice. Having ruled that the President did not have authority to cancel the provision, Judge Hogan dismissed the part of the NTEU's suit which contended that the Act was unconstitutional. This was the second of two such rulings in federal court where opponents would fail to prove they had standing to challenge the constitutionality of the Act.

The first began on January 2, 1997, when six members of Congress, led by Senator Robert Byrd, filed suit for declaratory judgement against the Act claiming that it violated Article I, Section 7 of the Constitution. The Act, they alleged, violated the requirement for bicameral passage of legislation by providing the President with the authority to unilaterally repeal provisions of federal law.<sup>1</sup> The congressmen claimed that they were "directly and concretely [injured]... in their official capacities," because the Act,

Alter[ed] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items; divests [them] of their constitutional role to repeal legislation;

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<sup>1</sup> Rehnquist, C. J., Chief Justice of the United States, *Raines v. Byrd*, "Opinion of the Court," Supreme Court of the United States, Jun 26, 1997.



and, alter[ed] the constitutional balance of powers.<sup>2</sup>

The basis for this claim was that the Act had an immediate detrimental effect on their constitutionally prescribed powers by changing the nature of negotiations on future legislation. Prior to its passage "Members could reach compromises with each other on spending and tax bills... because every Member had assurance that a bill could take effect only in the agreed upon form."<sup>3</sup> With passage of the Line Item Veto Act, the President now had the power to breach those compromises by his unilateral action. The President's ability to "re-shape" legislation changed the legal effect of their votes. Under the Line Item Veto Act, passage of legislation simply provided the President with a menu of different alternatives to chose from, thus injuring them "whenever a bill [came] up for a vote."<sup>4</sup>

The Administration challenged the congressmen on the procedural issue of legal standing. It asserted that the constitutional challenge presented by the congressmen should be dismissed because it was not "ripe." They had not been injured by the Act, and therefore lacked standing

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Supreme Court of the United States, Raines v. Byrd, "Brief for Appellees," May 9, 1997, p. 6.*

<sup>4</sup> *Ibid.*

to sue. Claiming that the appellees had only a "generalized" and "speculative" grievance against the Act, the Administration stated that they could not prove a "judicially cognizable private interest" had been injured.<sup>5</sup> Any claimed injury to their constitutional powers failed to meet this requirement and, thus, the appellees could not prove they had standing as required under Article III of the Constitution.<sup>6</sup>

On April 10<sup>th</sup>, District Court Judge Thomas Jackson delivered his opinion. Judge Jackson found that the appellees did indeed have standing to bring suit under standards set by the D.C. Court of Appeals. The appellees claim that the Act "dilute[d] their Article I voting power" was enough to confer Article III standing.<sup>7</sup> The appellees' perception that the Act adversely affected them by changing the meaning of their votes was enough to prove they were injured by the Act.<sup>8</sup>

In a strong statement, Judge Jackson struck down the Line Item Veto Act. "The power to 'make' the laws of the nation is the exclusive, nondelegable power of Congress,"

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<sup>5</sup> *Supreme Court of the United States*, Raines v. Byrd, "Reply Brief for Appellees," May 21, 1997, p. 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> Rehnquist, C. J., Chief Justice of the United States, Raines v. Byrd, "Opinion of the Court," *Supreme Court of the United States*, Jun 26, 1997.

<sup>8</sup> *Ibid.*

he said.<sup>9</sup> The Act was unconstitutional because it "effectively permitt[ed] the President to repeal duly enacted provisions of Federal law."<sup>10</sup> In delegating such power to the President, Congress risked upsetting the constitutionally prescribed balance between the branches of government.

Jackson had issued the first defeat to the Line Item Veto Act. Opponents of the legislation were obviously happy about the decision, Senator Byrd calling it a "great day for the Constitution and the American people."<sup>11</sup> However, the Administration made clear its intention to appeal Jackson's ruling. In a statement afterward, President Clinton called the Line Item Veto an important tool "in helping preserve the integrity of Federal spending," and said "we have to appeal it."<sup>12</sup>

The Supreme Court heard the appeal on an expedited schedule. On May 27, 1997, the Court heard formal arguments. On June 26<sup>th</sup>, the justices dismissed the case, disagreeing with Judge Jackson's contention that the appellees had standing. Chief Justice Rehnquist delivered the opinion of the Court. Citing *Moore v. U.S. House of*

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<sup>9</sup> Taylor, Andrew, 1997, "Judge Voids Line Item Veto Law," Congressional Quarterly, (Apr 12), p. 833.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

Representatives, and refuting the precedent cited by Judge Jackson, Justice Rehnquist stated, "The Supreme Court has never endorsed the Court of Appeals analysis of standing."<sup>13</sup>

To prove standing, Justice Rehnquist continued, the congressmen must prove *personal injury* because of the Act, rather than injury to their official capacity. The claim brought by the congressmen was that the nature of their votes was adversely affected by the Act. Such a claim focused only on their official capacities. "If one of the members were to retire tomorrow, he would no longer have a claim," Justice Rehnquist concluded.<sup>14</sup> Thus, precedent did not support the congressmen's claim.

According to Chief Justice Rehnquist, neither legal precedent nor historical practice supported the plaintiffs. Whenever there had been disputes between Congress and the President in the past, "no suit was brought on the basis of claimed injury to official authority."<sup>15</sup> To show this, Justice Rehnquist used the *Tenure of Office Act* which passed over President Andrew Johnson's veto in 1867. Justice Rehnquist stated that Johnson had had a much stronger claim of injury than did the current plaintiffs.

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<sup>13</sup> Rehnquist, C. J., Chief Justice of the United States, *Raines v. Byrd*, "Opinion of the Court," Supreme Court of the United States, Jun 26, 1997.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

According to the Tenure of Office Act, the President had to get approval from the Senate before dismissing any appointee whose appointment had required the approval of the Senate. When Johnson dismissed his Secretary of War without the consent of the Senate, the House of Representatives began impeachment proceedings against Johnson. Johnson's official capacities were clearly injured by the Tenure of Office Act, but if the federal courts adjudicated the matter, they would have "improperly and unnecessarily plunged into [a] bitter political battle."<sup>16</sup>

Having concluded that legal precedent and historical practice failed to support the plaintiffs, the Supreme Court vacated the ruling of Judge Jackson and dismissed the case. With the ruling, the constitutionality of the Line Item Veto Act was not considered. Once again it was dismissed only on the grounds of standing without consideration of its constitutional merits. It would take the President's exercising of the Act, from which an individual could claim personal injury, before the justices would consider that the plaintiff's had the necessary standing to sue.

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<sup>16</sup> Ibid.

## **B. LINE ITEM VETO ACT RULED UNCONSTITUTIONAL**

The President's cancellation of a targeted tax benefit to allow an exemption of taxes on gains from the sale of food-processing equipment to the Snake River Potato Growers provided the type of personal injury required for Article III standing. His cancellation of the New York Medicaid spending measure provided another example of personal injury. The parties claiming injury from these two Line Item Veto cancellations filed suit in D.C. District Court for declaratory judgement against the Line Item Veto Act. The two cases were combined and heard by Judge Thomas Hogan on January 14, 1998.

Judge Hogan ruled that, based on the requirements set forth by the Supreme Court in *Raines v. Byrd*, both the City of New York and the Snake River plaintiffs had standing to sue. The Snake River growers had suffered at least one injury from the Act. The injury resulted when the Idaho Potato Packers (IPP) called off negotiations over the sale of a potato processing facility due to President Clinton's cancellation of an item from the Taxpayer Relief Act. The IPP withdrew from these negotiations because it would no longer be able to defer taxes on gains resulting from the

sale.<sup>17</sup> Likewise, the City of New York was immediately injured when the President canceled the provision from the Balanced Budget Act of 1997, which was to eliminate its financial liability under federal law. President Clinton's cancellation renewed that financial liability, thus providing concrete injury to hospitals and associations within the City of New York.<sup>18</sup>

After ruling on the issue of standing, Judge Hogan declared that the Line Item Veto Act was unconstitutional because it "violat[ed] the procedural requirements ordained in Article I of the Constitution."<sup>19</sup> The Act, he said, violated the requirement for "bicameral passage and presentment [of legislation] to the President."<sup>20</sup> It also disrupted the balance of powers between the branches of government. Calling it an "abandonment of lawmaking power," Judge Hogan went on to say that it,

Impermissibly crosses the line between acceptable delegations of rulemaking authority and [is an] unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation.<sup>21</sup>

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<sup>17</sup> Hogan, Thomas F., *City of New York v. William J. Clinton, Snake River Potato Growers Inc., v. Robert E. Rubin*, "Memorandum Opinion," U.S. District Court for the District of Columbia, Feb 12, 1998.

<sup>18</sup> *Ibid.*

<sup>19</sup> Taylor, Andrew, 1998, "Line-Item Veto Struck Down Again," *Congressional Quarterly*, (Feb 14), p. 381.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

The Administration appealed Judge Hogan's ruling to the Supreme Court. The Court heard the appeal on an expedited schedule, with arguments commencing on April 27, 1998 and issued its ruling on June 25<sup>th</sup>.<sup>22</sup> The Court upheld Judge Hogan's interpretation of legal standing as well as his judgment that the Line Item Veto Act was unconstitutional. In a lengthy ruling, the Court declared that the Act did, indeed, violate the Presentment Clause of the Constitution. Citing, among other cases, *INS v. Chadha*, the Court ruled that,

The Article I procedures governing statutory enactment were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure."<sup>23</sup>

The Act profoundly changed the method by which laws were enacted. It gave the President the power to fundamentally alter legislation, which had been thoroughly debated in Congress. If the President could determine which cancellations to make within just five days, he could essentially enact a new piece of legislation that bypassed the exhaustive process the Framers had put into place.

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<sup>22</sup> *Supreme Court of the United States, Clinton v. City of New York, "Syllabus,"* Supreme Court of the United States, Jun 25, 1998, p. 1.

<sup>23</sup> *Ibid.*, p. 3.



This was, according to the Court, beyond the President's power as provided in the Constitution.

Justice Stevens, who wrote the *Opinion of the Court*, provided a lengthy assessment of why the Line Item Veto Act violated the Constitution. In describing the President's powers to sign legislation into law, he focused on what the Constitution allowed the President to do, and how those procedures were upset by the Act. The Constitution, he said, gives the President power to return legislation to Congress prior to its enactment into law, but not after. It is "silent on the subject of unilateral presidential action that either repeals or amends parts of duly enacted statutes."<sup>24</sup>

According to Justice Stevens, the President's cancellations had the "practical effect" of amending two pieces of legislation by "repealing a portion of each." Again quoting the *Chadha* case, Stevens stated that the "[R]epeal of statutes, no less than enactment, must conform with Article I."<sup>25</sup>

There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but

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<sup>24</sup> Stevens, J., *Clinton v. City of New York*, "Opinion of the Court," Supreme Court of the United States, Jun 25, 1998, p. 21.

<sup>25</sup> *Ibid.*, p. 19.

neither addresses the issue presented by these cases.<sup>26</sup>

Upon issuing its ruling, the Court emphasized three points. First, the justices expressed no opinion about the utility of the Act. Second, they did not consider Judge Hogan's contention that the Act disrupted the balance of powers between the branches of government. And third, the justices focused only on the narrow question of whether or not the Act was constitutional.<sup>27</sup>

### C. CONCLUSION

After several attempts, the Supreme Court had at last ruled on the Act's constitutionality. Robert Byrd and others celebrated their final victory over what he had once referred to as an "abomination" and "horror."<sup>28</sup> Meanwhile, some ardent supporters introduced new legislation on the same day as the Supreme Court's ruling that they hope can pass constitutional muster. At least four bills were introduced (H.J. Res. 124, S. 2220, S. 2221, and H.R. 4174) which intend to provide the President authority similar to the Line Item Veto Act. Only one of the four seeks to provide that power by constitutional amendment; the other

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Supreme Court of the United States*, Clinton v. City of New York, "Syllabus," Supreme Court of the United States, Jun 25, 1998, pp. 3, 4.

<sup>28</sup> 1998 *Hearings*, p. 4.

three provide it by statutory means. However, any movement toward passage of these bills for the immediate future seems unlikely.

With the Act rendered unconstitutional, it remained to determine how to treat the canceled projects. Including the Snake River and New York lawsuits, 43 cancellations had now been voided by the Supreme Court. These cancellations represented \$569 million in scheduled outlays or losses in revenue over five years.\* Many individuals wanted to know if these funds would be released immediately or if individuals would have to request them from the Office of Management and Budget. The Clinton Administration considered what to do with the funds for several weeks, until July 17<sup>th</sup>, when OMB announced all funds from canceled provisions would be released immediately.<sup>29</sup>

The Line Item Veto Act had failed to withstand the scrutiny of the high Court. With its demise, there was little outcry from congressmen. During the short, controversial and unhappy life of the Act, many of its supporters had become opponents. Practical experience with

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\* This number is determined by summing the amounts listed on the final line of Table (4) in Chapter IV. The amounts represent the *net budgetary effect* after passage of the Military Construction Disapproval Bill and Judge Hogan's ruling, which overturned the FERS open season provision in the Treasury Appropriations Act.

<sup>29</sup> *Business and Society* "Clinton Gives Up on Line Item Veto Fight," 1998, Congressional Quarterly, (Jul 18), p. 1956.

the measure had left all but the most devout deficit-hawks leery of new legislation to revive it. Whether there will be a push for expedited or enhanced rescission authority in future congresses remains unknown. For now, though, the Line Item Veto will be remembered as a short-lived experiment that did not last long enough to demonstrate its value.

## VI. SUMMARY AND CONCLUSIONS

Among major legislative issues, the Line Item Veto is unique in many ways. For example, one hundred and twenty-four years passed between President Grant's initial call for the measure and President Clinton's signing the Line Item Veto Act into law. Yet, within one year of the President's first Line Item Veto cancellation the Act was declared unconstitutional by the Supreme Court. Supporters had long realized that a constitutional amendment would be required to provide enhanced powers to the President. But in well over one hundred years, support for such an amendment had failed to materialize.

Realizing they had no chance of ratifying a constitutional amendment, supporters sought to enhance the President's power by statutory means. This required some circumventing of the Constitution. To accomplish this, supporters based the new law on the President's power to rescind funds as established in the Congressional Budget and Impoundment Control Act of 1974. By simply enhancing these powers, they believed, the Line Item Veto Act would withstand constitutional scrutiny. Their determination proved wrong.

Because the measure was only in effect for one year, it is difficult to draw any conclusions about the shift in budgetary powers from Congress to the President. While the mechanics of the measure appeared to favor the President in disputes over spending priorities with Congress, 1997 saw relatively little in the way of heated budget battles, providing scant evidence for speculation.

This chapter will briefly re-examine the issues of this thesis to determine what the political and fiscal impacts of the Line Item Veto have been. Based on the mechanics of the Act, and some general views about congressional motives (i.e., congressmen attempt to pass legislation favorable to their constituents), the chapter will explore congressional reaction to President Clinton's cancellations. This will aid in understanding the political impact of the measure. Finally, the thesis will compare President Clinton's use of rescissions to his use of the Line Item Veto to help determine the new measure's impact on the budgeting process.

#### **A. POLITICAL IMPACT OF THE LINE ITEM VETO**

Accurately determining the political and fiscal impact of the Line Item Veto is difficult because we are confined to the experiences of a single year. During that year, one

political effect occurred that may not have been anticipated. After witnessing the President cancel items from a popular piece of legislation, many supporters of the Line Item Veto turned in opposition to it. Some Republicans began to view passage of the Act as a mistake and spoke out against the measure. Democrats, who had long opposed the Act, welcomed this change in position. In October, Senator Robert Byrd(D) and Representative David Skaggs(D) introduced a total of three bills to repeal the Line Item Veto Act; however, none of them were reported out of committee.<sup>1</sup>

The reaction described above is not meant to suggest that the Line Item Veto was used in a partisan manner. The most significant dispute surrounding its use occurred when the President canceled 38 projects from the Military Construction (MilCon) Appropriations Act. Congressional reaction to these cancellations centered on inaccuracies in criteria the President cited in making cancellations, as well as the view from members that he was intruding on their political responsibilities.

The MilCon bill had drawn widespread support from both political parties. Both Democrats and Republicans in

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<sup>1</sup> *Congressional Record*, (Oct 9, 1997), p. H9045; (Oct 25, 1997), p. S11117.

Congress saw President Clinton's cancellations from that measure as an attack on their prerogatives. Opponents and supporters alike rallied behind the disapproval legislation to defend their individual priorities against this attack from the Executive.

Republicans did not view the President's cancellations as partisan. Indeed, throughout 1997 President Clinton's cancellations went across party lines. The limited use of the measure, which will be considered later, also helped to mute charges of partisanship. It also minimized suggestions that Congress' power relative to the President had been severely diminished. In fact, concerns that the Line Item Veto could provide the President with an ability to push through a partisan agenda came from members of his own party. Republicans had, after all, fought hard to provide him with this enhanced power.

Rather than using the measure for partisan advantage, the President used it as a bargaining tool to ensure that his priorities were left in the budget. He also used it to cancel items that he determined were unnecessary and wasteful.

The MilCon bill was unique because the President's Line Item Veto cancellations caused such a determined



response from members of Congress. As a result of his cancellations on this legislation, Congress drafted the only disapproval bill to be reported out of committee. From there it went on to pass both houses of Congress and then became law over a presidential veto. The sustained and unified congressional support for this disapproval bill was mainly due to members' concerns that the President was infringing on their political prerogatives.

The Military Construction Appropriations Act was not the only bill to be subject to disapproval legislation. As mentioned in Chapter IV, cancellations from the Balanced Budget Act of 1997 and Taxpayer Relief Act also resulted in the introduction of disapproval bills. However, the bills attracted little support and were never reported out of committee. Possible reasons for the lack of congressional interest were that the cancellations were not viewed as infringing on congressional prerogatives and that they were relatively minor.

A review of the President's cancellations and congressional response to them reveals that the Line Item Veto Act functioned as it was intended. When Congress felt strongly enough, it was able to overturn the President's cancellations. However, when those cancellations failed to

stir congressional interest, they were allowed to stand. This was indeed what the framers of the Act had intended.

The other dynamic that was seen during this first year was the importance of the President's budget submission. As stated earlier, the primary reason given by President Clinton for canceling an item of spending was that it had not been requested in his budget. The President can use the Act to re-shape legislation to resemble what he had previously requested, as long as his priorities are already written into the bill. The Act, therefore, modified the President's position in bargaining with Congress. No longer did they have to reach agreement on the entire bill. As long as his priorities were written into the bill, he could re-shape the rest of the legislation in a way that best suited his judgement.

However, this did not provide carte blanche authority for the President to re-shape legislation. In the case of a president who was unwilling to compromise, Congress maintained some ability to strengthen its position. For example, since the Act was passed by statute rather than constitutional amendment, Congress could conceivably exempt items from the President's veto. Shielding items from the

President would prompt him to either sign or veto the legislation in its entirety.

Congress ultimately drafts legislation based on the desires of the President and its own constituents. If the President threatened to cancel items that were important to Congress, Congress could respond with legislation that omitted presidential spending priorities. Since the President was unable to add to legislation a strong Congress could take this position and challenge the President to veto the legislation.

The strict limits within the Act establishing how the Line Item Veto could be used also aided Congress' position vis-a-vis the President. When the President overstepped those bounds by canceling the FERS open season provision, the federal courts responded by declaring it beyond the President's power. Also significant was the lock-box mechanism, which kept the President from re-directing funds to his spending priorities.

The threat to the relative bargaining positions between Congress and the President was a major concern for opponents of the measure such as Senator Byrd. Not only did they claim that the relative importance of their votes had changed, but they also worried that the Line Item Veto

could be used for partisan advantage. It is noteworthy that this argument came from members of the President's own party. Though no such example occurred during the Act's short period of enactment, the Line Item Veto proved, even in its limited use, to be too discomfoting for many members of Congress. As a result there were few who decried the Supreme Court's ruling.

These represent the major political impacts of the Line Item Veto Act. None of the changes represented a significant shift in budgetary powers. Each could be offset in some manner by the other branch of government. Rather than threatening the very foundations of the legislative system as some opponents had predicted, the Line Item Veto had only a small impact on the budgeting process. Here again, the main limitation on judging its impact is time. Had the measure not been ruled unconstitutional it may well have impacted on the process in the manner that many of its opponents feared.

#### **B. FISCAL IMPACT OF THE LINE ITEM VETO**

For all of the debate about the effect the Line Item Veto would have on the budgeting process, its first year was less than memorable. President Clinton's use of the measure to curtail wasteful spending and force Congress to

adopt his spending priorities was limited. In fact, the President had a stronger record of re-shaping legislation through rescissions than what he accomplished in his first year with the Line Item Veto.

In 1996, the last year before President Clinton had the Line Item Veto, he proposed 24 rescissions totaling over \$1.4 billion in budget authority. Congress enacted 8 of his proposed rescissions totaling \$963 million.<sup>2</sup> Although the number of rescissions requested by President Clinton was less than one-third of the number of his Line Item Veto cancellations, the dollar amount was significantly higher. In each of his first four years as President, the number of rescissions he requested never matched the number of his Line Item Veto cancellations for 1997. (Table (8) shows proposed and enacted rescissions for each year of Clinton's presidency through 1996).

As can be seen from the table, President Clinton was relatively consistent in his use of rescissions. His use of the Line Item Veto falls within the range of dollar amounts of his previous rescissions. In 1997, the number of Line Item Veto cancellations was significantly higher, while the dollar amount canceled was roughly the same.

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<sup>2</sup> Acting Comptroller General, General Accounting Office, "Summary of Proposed and Enacted Rescissions through Fiscal Year 1996, Oct 6, 1997, p. 3.

This suggests that he was more precise with the Line Item Veto Act than he had been with traditional rescission authority.

**Table (8)**  
**Rescissions During the Clinton Administration**

Fiscal Year	Rescissions Proposed by President Clinton		Presidential Proposals Enacted by Congress	
	Number	Dollar Amount	Number	Dollar Amount
1993	7	\$356,000,000	4	\$206,250,000
1994	65	\$3,172,180,000	45	\$1,293,478,546
1995	29	\$1,199,824,000	25	\$845,388,805
1996	24	\$1,425,900,000	8	\$963,400,000
<b>Total</b>	<b>125</b>	<b>\$6,153,904,000</b>	<b>82</b>	<b>\$3,308,517,351</b>

Source: General Accounting Office, Communication from the Acting Comptroller General, October 6, 1997.

In every year except 1996, Congress accepted a higher percentage of his rescissions than they did his Line Item Vetoes. They accepted just under 54 percent (44 out of 82) of his Line Item Veto cancellations in 1997. This is striking considering the extent to which the Line Item Veto Act was supposed to favor the President in a battle over cancellations.

Once again the limited amount of time during which the Line Item Veto was available limits our ability to interpret this data. It is also true that the rescission process is not precisely comparable to the Line Item Veto. The President has broader authority to propose rescissions,

but less power to implement them as Congress is not obligated to consider his proposed rescissions.

At a minimum, the available data may suggest that even with the Line Item Veto Act, Congress retained significant authority to overturn the President's cancellations. Whether this could have been expected to continue in the future is unknown. Clearly if the Act was seen to have shifted too much power to the President, Congress had the power to overturn the Line Item Veto Act on its own, even with the threat of a presidential veto. At the very least the sunset date would keep any shift in budgetary powers from being permanent.

Congress, on its own, initiated over \$28 billion in rescissions during President Clinton's first four years.<sup>3</sup> Congress generally rescinds more budget authority on its own than it enacts by request of the President. During Bush's Presidency, Congress initiated \$26 billion worth of rescissions. While in eight years with President Reagan, it initiated \$33 billion in budget authority.<sup>4</sup>

The reasons Congress employs rescissions are essentially the same as the President. Changing circumstances may make previously enacted budget authority

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<sup>3</sup> Ibid., Encl. II.

<sup>4</sup> Ibid.

unnecessary. Additionally, Congress uses rescissions to offset additional spending in other areas. As congressional priorities change, it may cancel spending that it had previously passed in favor of its new priorities. In order for those rescissions to be permanent, they must be passed by both houses of Congress and signed into law by the President.

In 1995, Congress initiated the vast majority of its total rescissions to date during the Clinton Administration, totaling \$18.9 billion.<sup>5</sup> This was ostensibly part of the new Republican majority's policy to reverse the trends of bigger government and uncontrolled spending which, they argued, had characterized Democratic control of Congress. However, it demonstrates the significance of congressional reaction to a relatively small amount of canceled budget authority from the MilCon bill.

This information should be considered in light of the consternation among members of Congress caused by the Line Item Vetoes against the MilCon bill. The explanation for their widespread opposition is likely political, especially considering the large number of projects canceled by the President. That bill alone accounted for more



cancellations than the total number of rescissions he had requested in three out of his first four years in office. Instead of focusing on a few big items he canceled numerous smaller ones, raising the ire of many congressmen. It was not the total amount of canceled spending that concerned members of Congress, but the fact that so many of them had been directly affected by those cancellations.

Clearly President Clinton did not use the Line Item Veto to re-shape congressional spending priorities as Nixon had done with impoundments. Instead, President Clinton used it for what it was best suited to accomplish; the curtailment of what he considered pork-barrel spending (i.e., spending for projects that were not in the President's budget). Still, his use of the Line Item Veto was measured compared to all of the items on which it could have been applied.

The fact that President Clinton did not focus on using the Line Item Veto to reduce the federal deficit, but instead to control *wasteful spending* is clear from any cursory look at individual cancellations. There was no overriding ideological program he was attempting to implement, as Nixon had with his impoundments of funds for domestic social programs. Instead, as he said prior to his

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<sup>5</sup> Ibid.

first cancellation, he was simply looking for "sufficiently objectionable" items that ought to be vetoed.<sup>6</sup>

The term 'wasteful spending' above is italicized because it is subjective. Private negotiations that took place during the budgeting process suggest that President Clinton was willing to supplant congressional pork with executive pork whenever possible.<sup>7</sup> In this vein, the Act was used as a bargaining tool to ensure presidential spending priorities were in the budget. But, the overall fiscal impact of this was negligible.

#### C. CONCLUSION

In its one year, the Line Item Veto clearly had no great impact on the budget. While it was responsible for introducing some new political dynamics, it failed to demonstrate that it represented a tremendous shift in budgetary powers to the President. Similarly, the fiscal impacts of the measure were unimpressive. While President Clinton clearly focused on using the measure to curtail pork, it failed to have any real effect on the federal deficit. His Line Item Veto cancellations reduced federal

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<sup>6</sup> Clinton, William J., "Press Conference by the President," The White House, Aug 6, 1997.

<sup>7</sup> Taylor, Andrew, 1997, "With CR Done, Focus Now is on Line-Item Veto," Congressional Quarterly, (October 4), p. 2387.

discretionary spending by just 0.09 percent.<sup>8</sup> Congress and the federal courts overturned a significant portion of his cancellations, further reducing the fiscal impact of the Act. Other factors had helped to reduce the size of the deficit in 1997 that were totally unrelated to the Line Item Veto Act.

Had the Line Item Veto Act not been subjected to rigorous constitutional scrutiny, its first year may have been significantly different. President Clinton may have been willing to use the measure more widely, bringing about a markedly different conclusion of its overall effectiveness and impact. Again, the greatest limitation in understanding the significance of the measure on the budgeting process is time. Had the measure survived its constitutional challenges it could have become a key component in the budgeting process. But to what extent it would have shifted power from Congress to the President cannot be known.

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<sup>8</sup> Congressional Budget Office, "The Line Item Veto Act After One Year," CBO Memorandum, (April 1998), p. 14.



## APPENDIX A. ANALYSIS OF LEGISLATION

The following is a brief analysis of the specific provisions of the Line Item Veto Act.

### Cancellation Authority

The President may cancel in whole-

- (1) Any dollar amount of discretionary budget authority;
- (2) Any item of new direct spending; or,
- (3) Any limited tax benefit;

If the President-

- (A) Determines that such cancellation will-
  1. Reduce the federal budget deficit;
  2. Not impair any essential government functions; and,
  3. Not harm the national interest; and,
- (B) Notifies the Congress of such cancellations by transmitting a special message within five calendar days.
  1. The special message shall specify-
    - a. The dollar amount canceled,
    - b. The determination that none of the three requirements in subparagraph (A) are violated,
    - c. The reasons for the cancellation,
    - d. The estimated fiscal, economic, and budgetary effects of the cancellation,
    - e. All facts and circumstances relating to the cancellations,
    - f. The corresponding adjustments that will be made to the discretionary spending limits.
  2. If the cancellation is of an item of new direct spending or discretionary budget authority the special message will also include-
    - a. Any account, department, or establishment of government for which such budget authority was to have been made available,
    - b. The specific states and congressional districts affected,
    - c. The total number of cancellations imposed during the current session.

## **Deficit Reduction**

The Office of Management and Budget is charged with providing the estimates of each cancellation, in accordance with the Balanced Budget and Emergency Deficit Control Act of 1985. For each cancellation of a dollar amount discretionary budget authority the discretionary spending limits will be reduced by an equal amount. This provision is widely referred to as the "lock-box" mechanism. If Congress does not act within the period required to introduce a disapproval bill then, after a 10-day period, OMB will make the necessary adjustments to the discretionary spending limits.

As soon as practicable the Congressional Budget Office will make estimates of the reduction in budget authority. Such estimates will display the reduction in outlays flowing from such reduction of budget authority for each outyear.

## **Expedited Consideration**

The Act provides for a review period of 30 calendar days, when both Houses are in session, to introduce a disapproval bill. If Congress adjourns at the end of a Congress, prior to the end of the 30 day period, and if there is a disapproval bill pending, then the Congress will have five calendar days of session of the next Congress to introduce a disapproval bill for the same special message.

## *Consideration in the House of Representatives*

Any committee to which a disapproval bill is referred must report it, without amendment, no later than the seventh calendar day of session after the date of introduction. If the committee fails to report the bill, a member who favors the bill can move to discharge the committee from further consideration of the bill.

After a disapproval bill is reported or a committee has been discharged from further consideration the bill moves to the floor. If reported and the report has been available for at least one calendar day, all points of order against the bill and against consideration of the bill are waived. Votes to reconsider are not in order. General debate shall not exceed one hour, equally divided between a proponent and an opponent of the bill. Amendments may be offered under the five minute rule and

are limited to striking specific reference number items within the bill, or adding a reference number that was in the original special message, but subsequently left out of the disapproval bill.

Debate of the conference bill, if necessary, is also limited to one hour.

### *Consideration in the Senate*

Any disapproval bill will be sent to the appropriate committee which will have seven days to report the bill. If they fail to report the bill within that time, they will be discharged from further consideration and the bill will be placed on the calendar. If the Senate receives a disapproval bill from the House of Representatives, it will be immediately placed on the calendar without being referred to committee.

Amendments are similarly limited in the Senate.

### **Definitions**

- (1) Cancel- To rescind any dollar amount of discretionary budget authority. With respect to any item of new direct spending or limited tax benefit, to prevent such budget authority from having legal force.
- (2) Disapproval bill- Any bill or joint resolution which only disapproves one or more cancellations.
- (3) Dollar amount of discretionary budget authority- The entire dollar amount of budget authority specified in an appropriation law or the amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included. It does not include direct spending.
- (4) Item of direct spending- Any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated in the Balanced Budget and Emergency Deficit Control Act of 1985.
- (5) Limited tax benefit- Any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under the Internal Revenue Code of 1986, in any fiscal year for which the provision is in effect. Also, any federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries.

## **Identification of Limited Tax Benefits**

The Joint Committee on Taxation must review any revenue or reconciliation bill or other such legislation that contains a tax adjustment and provide a statement to the conference committee charged with drafting the final version of the pertinent bill, identifying any limited tax benefits. If none are identified, then the Joint Committee will prepare a statement that no such limited tax benefit exists.

## **Judicial Review**

Anyone who is adversely affected by the Act may bring an action in the United States District Court for the District of Columbia for declaratory judgement and injunctive relief on the grounds that it violates the Constitution. Such actions have the right of appeal to the Supreme Court. The District Court is to expedite, to the maximum extent possible, the disposition of any matter brought against the Act.

## **Effective Dates**

The Act becomes effective on the earlier of either the day after the enactment into law of a plan to balance the budget in seven years, or January 1, 1997. The act shall have no effect on or after January 1, 2005.

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Source: Congressional Record and Congressional Quarterly



## APPENDIX B. HISTORY OF THE LINE ITEM VETO ACT

This table provides a brief overview of the key dates and events surrounding the Line Item Veto Act.

Date	Event
1-4-95	104 <sup>th</sup> Congress convenes with a Republican majority. One of their major objectives is passage of the Line Item Veto.
2-6-95	The House of Representatives passes H.R. 2, a bill to provide the Line Item Veto to the President. The bill passes 294-134.
3-23-95	The Senate passes S-4, a significantly different measure than H.R. 2. It seeks to provide the same power to the President but through a method called 'separate enrollment.' The measure passes 69-29.
3-27-96 and 3-28-96	After a lengthy conference, the House and Senate approve a compromise version of the Line Item Veto. The measure passes the Senate on 3-27-96 by a vote of 69-31. The following day the House passes this version by attaching it to a rule. The rule passes 232-177.
4-9-96	President Clinton signs the Line Item Veto Act into law as P.L. 104-130.
1-1-97	The Line Item Veto Act becomes effective for use by President Clinton.
1-2-97	Senator Byrd and five other congressmen file suit for summary judgement in federal district court, seeking to have the Line Item Veto Act ruled unconstitutional.
4-10-97	Judge Jackson finds for the plaintiffs, ruling that the Line Item Veto Act is unconstitutional. It is the responsibility of Congress to make the nation's laws, he says, not the President. Congress cannot delegate such sweeping power to the President.

6-26-97	Supreme Court vacates Judge Jackson's Ruling. Justices say that the plaintiffs lack legal standing to sue because they have not been injured by the Act and dismiss the case.
8-11-97	President Clinton exercises the Line Item Veto Act for the first time in history on two provisions from the Taxpayer Relief Act and one provision from the Balanced Budget Act of 1997.
10-6-97	President Clinton cancels 38 items from the Military Construction Appropriations Act. The cancellations are broadly opposed in Congress.
10-16-97	President Clinton makes one cancellation from the Treasury Appropriations Act. The cancellation is on the FERS open season provision which would allow federal employees to switch from the Civil Service Retirement System to FERS.
11-8-97 and 11-9-97	The House and Senate pass the Military Construction (MilCon) Disapproval bill to overturn all 38 of the President's cancellations. This is the first such bill to ever pass Congress. It first passes in the House by a vote of 352-64. The next day it passes in the Senate by a vote of 69-30.
11-13-97	President Clinton vetoes the MilCon Disapproval Bill. This is the first such veto. Congress adjourns sine die this same day so no further action is taken on the bill during the first session of the 105 <sup>th</sup> Congress.
1-6-98	The FERS open season cancellation is overturned by Judge Hogan in federal district court. The ruling is part of an agreement between the NTEU and the Department of Justice. Judge Hogan does not rule on another part of their lawsuit which claims the Act is unconstitutional.
1-14-98	Judge Hogan hears case brought by the City of New York and the Snake River Potato Growers who claim personal injury because of the Act. The Plaintiffs seek to have the Act ruled unconstitutional.

2-12-98	Judge Hogan rules in favor of the plaintiffs. In a summary judgment he finds that the Act is unconstitutional because it violates the Presentment Clause of the Constitution.
2-5-98	The House votes to override the President's veto of the MilCon Disapproval Bill by a vote of 347-69.
2-25-98	The Senate votes to override the President's veto of the MilCon Disapproval Bill by a vote of 78-20.
6-25-98	Supreme Court upholds Judge Hogan's ruling in the case of the City of New York and the Snake River Potato Growers. The justices determine that the Act circumvents the exhaustive process involved in making the nation's laws. The Constitution, they say, does not give the President the power to unilaterally alter legislation after he signs it into law.
7-17-98	After three weeks of trying to determine what to do with the 1997 cancellations, the Office of Management and Budget decides to release the funds immediately.

Source: Congressional Record and Congressional Quarterly.



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